84-252

NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

ANN SHAVERS,

Petitioner

v.

WALTER E. HELLER & COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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41RP

QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are:

1. May a judgment be certified as final under Rule 54(b) of the Federal Rules of Civil Procedure against ONE defaulting defendant in a fraud and conspiracy case involving allegations of joint liability among multiple defendants where the remaining defendants have answered, contest liability, and may prevail on the merits, i.e., where the song is conspiracy, doesn't it still take two to tango under Frow v. De La Vega, 15 Wall. 552, 82 U.S. 552, 21 L. Ed. 60 (1872); or may one now dance alone under Rule 54(b)?

2. Does erroneous certification under Rule 54(b) of an otherwise interlocutory matter confer appellate jurisdiction in the absence of an express certification under 28 U.S.C. Section 1292(b), i.e., should "no just reason for delay" be

expanded in its meaning to "involve a controlling question of law to which there is substantial ground for difference of opinion and that an immediate appeal . . . may materially advance the ultimate termination of the litigation," or do the certificates serve distinctly different purposes?

PARTIES TO THE PROCEEDINGS

This is an action arising from an amended complaint for civil damages originating in United States District Court for the Northern District of Texas. The petitioner, ANN SHAVERS, was added as an additional party defendant to the amended complaint. Other defendants are: TYGER EQUIPMENT-INTERNATIONAL, INC., a Texas corporation, TYGER PUMP SERVICES, INC., a related Texas corporation, TED Y. HATCH, chairman and chief executive officer of the aforesaid "TYGER" corporations, and in his capacity as an individual doing business under the names TYGER QUIP OPERATIONS and B&H PROPERTIES. Additional defendants are: HERCULES CONCRETE PUMPS, INC., a Mississippi corporation which has been in Title 11 bankruptcy proceedings since May 24, 1983, at which time H. S. STANLEY, JR., was appointed as Trustee of the property of the corporation, and JOHN

SHAVERS, president of HERCULES CONCRETE PUMPS, INC., and husband of the petitioner. The plaintiff in the proceedings below and respondent herein is WALTER E. HELLER & COMPANY, a Delaware corporation.

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PETITION FOR CERTIORARI

OPINIONS OF LOWER COURTS

1. "WALTER E. HELLER & COMPANY v. TYGER EQUIPMENT-INTERNATIONAL, INC., ET AL.," No. CA3-83-0253-C (D.C. Tex. Sept. 15,

1983) (order denying Ann Shavers' motion to set aside default judgment) (the opinions, orders, findings of fact, judgment, and other actions taken by the United States District Court pertinent to the issues raised in this petition for certiorari appear as Appendices C, D, E, F, and I).

2. "WALTER E. HELLER & COMPANY v. TYGER EQUIPMENT-INTERNATIONAL, INC., ET AL.," No. 83-1683 (5th Cir. April 19, 1984) (petition for rehearing and suggestion for rehearing en banc denied per curiam, May 16, 1984).

JURISDICTION

The judgment of the court of appeals was entered on April 19, 1984. Timely petition for rehearing and suggestion for rehearing en banc was filed, and was denied on May 16, 1984. This Court has jurisdiction under 28 U.S.C. Section 1254

(1) to review the actions of the district court and the court of appeals, including the finality of the district court judgment and, therefore, its appealability.

STATUTES AND RULES INVOLVED

This case involves those federal statutes and procedural rules governing the entry of default judgments, the certification of such judgments as final in multiple defendant actions, and whether such judgments possess the requisite finality as to be appealable prior to the determination of the merits as to the remaining defendants. Fed. R. Civ. P. 54(a) and (b) (Appendix K); Fed. R. Civ. P. 60(b) (Appendix M); 28 U.S.C. § 1292(b) (Appendix L).

STATEMENT OF THE CASE

On September 15, 1983, the district court denied the motion of petitioner,

Ann Shavers, to set aside a $2,500,000 default judgment entered against her. The default judgment had been entered on July 1, 1983, when she was not represented by counsel and had made no appearance in the case. Petitioner had been added to an existing complaint in which the plaintiff had sought relief against a number of other defendants seeking civil damages for alleged fraud and conspiracy in certain heavy equipment leasing transactions. Petitioner was the only defaulting party in this multiple defendant action which remains pending, with liability being contested by the remaining defendants. Despite the necessarily joint nature of the liability arising from the alleged fraud and conspiracy scheme (Appendix J), the district court entered the default judgment awarding treble damages and certified it as final pursuant to Rule 54(b) of the Federal Rules of Civil Procedure

(Appendix D). Mrs. Shavers sought relief from the judgment pursuant to Rule 60(b) (Appendix G), which the district court denied on September 15, 1983 (Appendix C).

Mrs. Shavers timely appealed the denial of relief from the default judgment to the United States Court of Appeals for the Fifth Circuit. In her appeal, she raised a number of challenges to the validity of the default judgment, including abuse of discretion by the trial court. More significantly, however, she directly challenged the character of the judgment below, contending that it was not a "judgment" within the meaning of Rule 54(a) of the Federal Rules of Civil Procedure, and therefore not subject to certification under Rule 54(b) of the Federal Rules of Civil Procedure. She contends that where a single defendant defaults in a multi-defendant fraud and conspiracy case, a final judgment may not

be entered against the defaulting defendant until the liability of the contesting defendants has been established. She specifically raised the issue of finality of the judgment and therefore the court of appeals' jurisdiction, urging the court of appeals to dismiss the appeal on that basis, thereby "decertifying" the erroneously certified default judgment. Strangely, the opinion of the court of appeals and the per curiam opinion denying the petition for rehearing and suggestion for rehearing en banc are silent with respect to this issue (Appendices A, B).[1]

The court of appeals, by its silence in responding to these jurisdictional inquiries, assumed jurisdiction by its action in affirming the district court. Petitioner, Mrs. Shavers, seeks review of the affirmance of the $2,500,000 default judgment certified as final as

against the petitioner alone, and seeks reversal of the district court certification.

DISTRICT COURT JURISDICTION

The district court's jurisdiction was based alternatively upon federal question jurisdiction, 28 U.S.C. Section 1331, and diversity of citizenship, 28 U.S.C. Section 1332.

REASONS FOR GRANTING THE WRIT

There are two reasons for granting certiorari. First, the court of appeals in affirming the district court action has completely departed from established judicial precedent of this Court as uniformly followed by the circuits for many years in erroneously permitting a default judgment to be made final against a single defaulting defendant in a multi-defendant fraud and conspiracy case where the litigation remains pending against the other defendants who are contesting liability.

Second, the court of appeals, in affirming the district court has erroneously sanctioned a device whereby district courts may make interlocutory matters appealable at will by certification under Rule 54(b) of the Federal Rules of Civil Procedure, even where the certification is erroneous and the action of the district court is not a "judgment" within the meaning of federal law. These issues, which shall be addressed separately, are special and important because the court of appeals has rendered a decision in conflict with the prior decision of other federal courts of appeal on the same matter, and the prior decision of this Court, and by permitting the judgment to stand has departed from the accepted and usual course of judicial proceedings in a manner requiring the intervention of this Court's supervisory power. Additionally, improper certification of otherwise interlocutory

matters involves an important question of federal law in which there is a split among the circuits, which has not been settled by this Court, but which should be. Petitioner now analyzes the issues separately.

1. JOINT LIABILITY REQUIRES JOINT ACTIVITY--IT TAKES TWO TO TANGO. The case presently before this Court bears marked similarity to a decision of this Court over 100 years ago. Frow v. De La Vega, 15 Wall. 552, 82 U.S. 552, 21 L. Ed. 60 (1872). As in Frow, a default judgment was entered against one of several defendants in a fraud and conspiracy case maintained by a single plaintiff against those defendants. Frow was one of eight defendants which the plaintiff alleged to have conspired to defraud him of title to a tract of land. Frow defaulted, but the other defendants contested the allegations, and in fact, while Frow's default was on

appeal, won their case on the merits. The complaint in Frow alleged a conspiracy by Frow and others to defraud the plaintiff. The charges in Frow were "joint" in nature just as they are in this case. One hundred and twelve years ago, this Court first formulated the rule that:

> [I]f the suit should be decided against the complainant on the merits, the bill will be dismissed as to all the defendants alike--the defaulter as well as the others. If it be decided in the complaintant's favor, he will then be entitled to a final decree against all. But a final decree on the merits against the defaulting defendant alone, pending the continuance of the cause, would be incongruous and illegal.

82 U.S. at 554.

Of course, Frow preceded the adoption of Rule 54 of the Federal Rules of Civil Procedure and its included definitions regarding what may be considered a "judgment" for appealability purposes, and the certification procedure in multi-party cases. Has the adoption of Rule 54

impliedly overruled Frow? If so, one may now conspire alone and the incongruous result complained of in Frow can now occur if the plaintiff fails on the merits as to the other defendants. Suppose the remaining defendants are successful in their defense. Suppose that if they are not successful in defending the claims in their entirety, they are successful in defeating the RICO allegations and avoid treble damages. Suppose the remaining defendants are successful in establishing that the damages to the plaintiff are not at all as large as that alleged in the complaint. There is no cogent reason why the plaintiff should be permitted a greater recovery against Mrs. Shavers merely because she technically defaulted if the plaintiff cannot prove its case as to liability, or the full extent of its damages as the litigation proceeds. Such windfalls are not just.

Reliance upon a 112-year old rule of law, even though it was founded upon reason, justice, and equity might be questionable, particularly in light of the changes in procedure arising from the adoption of Rule 54, were it not for its continued recognition in the federal trial and appellate courts of this country since the adoption. Those courts use Frow, Id., to breathe life into the rule in joint liability cases. See International Controls Corp. v. Vesco, 535 F.2d 742, 746-47 n. 4 (2d Cir. 1976); Redding & Co., Inc. v. Russwine Construction Corp., 463 F.2d 929, 933 (D.C. Cir. 1972); Exquisite Form Industries, Inc. v. Exquisite Fabrics of London, 378 F. Supp. 403, 416 n. 19 (S.D. N.Y. 1974); In re Uranium Antitrust Litigation, 473 F. Supp. 382 (N.D. Ill. 1979), 617 F.2d 1248 (7th Cir. 1980).

Further, leading annotators have not seen Rule 54 of the Federal Rules of Civil

Procedure as changing in any way the Frow decision. 10 C. Wright, A. Miller, M. Kane, Federal Practice & Procedure: Civil 2d § 2690 (1983). In fact, the Frow rule has been extended to include cases where liability is not joint, but in which there are closely related defenses, an issue not presently before this Court, but indicative of the continued vitality of the principle of law. Cuebas y Arredondo v. Cuevas y Arrendondo, 223 U.S. 376, 32 S. Ct. 277, 56 L. Ed. 476 (1912); U.S. for Use of Hudson v. Peerless Ins. Co., 374 F.2d 942 (4th Cir. 1967).

The language of Rule 54 gives credence to the continued vitality of this time-honored principle of law. (Appendix K). The action of the Court, no matter how it may be entitled or described is not a judgment unless it is a "final decision"[2] from which an appeal is permitted under 28 U.S.C. Section 1291, or is "any appeal-

able interlocutory order."[3] As a default judgment against one defendant in a multiple defendant action involving necessarily joint liability (one cannot conspire with one's self) lacks the requisite finality to be certifiable under Rule 54(b), the district court departed from established judicial precedent of this Court and the uniform decisions of the circuits. By undertaking to certify the default in blatant contravention of Frow, Id., and its progeny, the district court committed grave error which has been perpetuated by the affirmance in the court of appeals. Unreported decisions have precedental value in the Court of Appeals for the Fifth Circuit, Local Rule 47.5.3 expressly providing in pertinent part: "Unpublished opinions are precedent." By its conduct, the Fifth Circuit has parted company with all other circuits and trial courts having previously considered this issue.

It does not appear that this Court has addressed the rule of law in at least 72 years[4], if not 112 years.[5] In joint liability cases, particularly where allegations of fraud and conspiracy are being contested in pending litigation, the plaintiff should not be so easily afforded an astronomical treble damages windfall judgment of Two and One Half Million Dollars before it is even determined that the plaintiff can prove its case against the other defendants. The enforcement of this judgment will have obvious catastrophic impact which can be averted only by last resort to this Court.

2. IMPROPER CERTIFICATION DOES NOT CREATE APPELLATE JURISDICTION. This Court has recently held that where an important question of federal appellate jurisdiction is involved, and where conflicts have arisen among the circuits, certiorari will be granted to review the decision of the

court of appeals even where the court of appeals had no jurisdiction to review an interlocutory order from the district court. Tidewater Oil Co. v. United States, 409 U.S. 151, 93 S. Ct. 408, 34 L. Ed. 2d 375 (1972). Significantly, the case involved the federal civil antitrust statutes, which have served as the model for the civil RICO statutes upon which liability is predicated for the treble damages granted in this case. Further, even more recently this Court has reminded us that it is obliged, even on its own motion, to consider the jurisdiction of the court of appeals if a question exists. Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737, 96 S. Ct. 1202, 47 L. Ed. 2d 435 (1976). This is such a case. Here, the petitioner has been forced to appeal an improperly certified "final judgment" in order to have the court of appeals decertify the judgment by dismissal for lack

of jurisdiction. Where, as here, the district court has abused its discretion in characterizing its action as a judgment when it is not, and certifying the "judgment" under Rule 54(b), the aggrieved party, particularly where a Two and One Half Million Dollar default judgment has been entered against her, can ill afford to simply ignore the judgment and appeal when it becomes final by virtue of termination of the proceedings as to the other parties in this multiple defendant action. Rather, she urged the court of appeals to note the lack of finality and appealability of the judgment, but it declined to do so. See n. 1. By asserting appellate jurisdiction without comment, the Fifth Circuit has compounded the error and has condoned the use of a procedural device, i.e., Rule 54(b) certification, to create finality and appellate jurisdiction where it does not

exist. District courts cannot certify as final that which is not final. Liberty Mut. Ins. Co. v. Wetzel, Id.; Spencer, White & Prentis, Inc. v. Pfizer, Inc., 498 F.2d 358 (2d Cir. 1974); Ryan v. Occidental Petroleum Corp., 577 F.2d 298 (5th Cir. 1978). See also n. 3.

As the district court lacked the ability to make a Rule 54(b) certification in this multiple defendant fraud and conspiracy case on the basis of a default judgment against one of the allegedly jointly liable defendants, for the first reason urged for granting certiorari, did the court of appeals consider that it had appellate jurisdiction of an otherwise interlocutory matter under 28 U.S.C. Section 1292(b)? This alternate jurisdictional theory was also advanced before the court of appeals,[6] although appellate jurisdiction is not discussed in the opinions below. (Appendix A, B).

Petitioner calls to the attention of this Court that making a Rule 54(b) certificate the equivalent of a Section 1292 (b) certificate involves a question of law which this Court has not directly addressed, although it has made certain implications in previous dicta, and further is a question of law which has been the source of considerable conflict a...ong the circuits. In DeMelo v. Woolsey Marine Industries, Inc., 677 F.2d 1030 n. 9 at 1034 (5th Cir. 1982), that circuit in dicta stated:

> We observe that the requirements of a section 1292(b) certificate are more stringent than those for a Rule 54(b) certificate in a case to which the rule is applicable. Particularly relevant in this connection is the requirement of section 1292(b) that the certified question be one of "law as to which there is a substantial ground for difference of opinion." As is noted in Wright, Miller, Cooper & Gressman, supra, § 3929, at 149:
>
> > "[I]f judgment has been entered under Rule 54(b) in circumstances that do

> not justify application of the rule, it is comparatively easy to conclude that the entry of a judgment should not of itself support appeal under the more demanding criteria of § 1292(b), absent an alternative finding of the recitals required by the statute." [Footnote omitted.]

Nevertheless, there is language in Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737, 745, 96 S. Ct. 1202, 1207, 47 L. Ed. 2d 435, 442 (1976), intimating that a Rule 54(b) certificate might satisfy the requirements of section 1292(b). And, such a procedure was allowed in Bergstrom v. Sears, Roebuck And Co., 599 F.2d 62, 64 (8th Cir. 1979). Contrary decisions were rendered in Morrison-Knudsen Co., Inc. v. Archer, 655 F.2d 962, 966 (9th Cir. 1981), and West v. Capitol Fed. Sav. & Loan Ass'n, 558 F.2d 977, 982 (10th Cir. 1977). We need not here determine this issue, though we observe that, as above-stated, there are substantive considerations embraced in a section 1292(b) certificate which are not addressed by a certificate under the rule. Our point is simply that the opinions indicating that compliance with Rule 54(b) will satisfy section 1292(b) support our holding here, and that such holding is not contrary to those decisions which refuse to find a Rule 54(b) certificate sufficient to meet section 1292(b).

677 F.2d n. 9 at 1034.

In assuming jurisdiction in this case, the court of appeals has taken a position contrary to its published position, albeit in dicta, and contrary to other circuits. Uniformity among the circuits ought to be established considering the jurisdictional quagmire which has now developed. DeMelo, Id., suggests that the circuit court lacked jurisdiction of this appeal, but recognized that other circuits have held to the contrary. A resolution of this issue is an important question of federal law which ought to be decided so as to eliminate the divergent results among the courts of appeal. It is also important to petitioner because if she is correct, as she believes that Frow, Id., precludes the entry of a judgment, and should appellate jurisdiction have been declined because there was no judgment which could be made final, then the judgment should be decertified. On the other hand, if the district court

certification can be equated to Section 1292(b) certification, the appeal was interlocutory, and she should still be permitted to challenge the judgment on its merits (the Rule 60(b) challenge necessarily did not go to the merits) once the judgment becomes final as to the remaining defendants.

The better reasoned approach is to give meaning to the words of certification and to recognize that certification is far more than an exercise in mere formalism, and that the language of the rule and of the statute are different because they are intended to serve different purposes. Those cases holding that Section 1292(b) certification criteria is more demanding are the more persuasive authorities. Morrison-Knudsen Co. v. Archer, 655 F.2d 962 (9th Cir. 1981); West v. Capitol Fed. Savings & Loan Ass'n, 558 F.2d 977 (10th Cir. 1977); Hunt v.

Mobile Oil Corp., 410 F. Supp. 10 (D.C. N.Y. 1976), aff'd, 550 F.2d 68 (2d Cir. 1977), cert. denied, 434 U.S. 984, 98 S. Ct. 608, 54 L. Ed. 2d 477 (1977).

The instant case illustrates that even if the certificates are interchangeable in some cases, they are not in all cases. It should be remembered that the Rule 54(b) certificate in the case now before this Court was not granted at the request of the aggrieved party to resolve a controlling question of law, which would be the normal function of certification under the rule, but was done at the instance of the prevailing party for the purpose of creating finality to allegedly insure that assets are available to satisfy the judgment. No controlling question of law was contemplated in any manner whatsoever as a basis for certification under the rule. The certification made by the district court was not for the purpose of permit-

ting petitioner to appeal, it was for the purpose of forcing petitioner to appeal. There is no reason to believe and no basis by which one might infer that the plaintiff was remotely interested in placing at issue the question of whether its default judgment was final for appealability purposes. The opposing party should not have to seek alternative certification or have it impliedly granted in order to have the interlocutory matter decertified when the petitioner, as the opposing party, would prefer to bring her appeal later from a judgment on the merits after the liability of the remaining defendants has been determined.

Accordingly, in the context of this case, certification under the rule cannot be an appropriate substitute for certification under the statute and this important question of federal law should be so resolved.

CONCLUSION

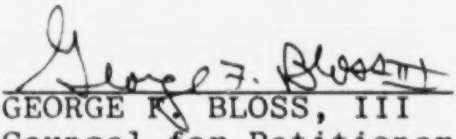
It has become in vogue for creditors to seek enforcement of default on obligations by using the strong-arm tactics of the threat of treble damages in civil RICO complaints, which were not designed or intended for the enforcement of civil obligations, even where they rise to the level of potential common law fraud. Recently, this abuse of civil RICO has reached monumental proportions. See Bankers Trust Co. v. Feldesman, 566 F. Supp. 1235 (S.D. N.Y. 1983). Not only has petitioner been deprived of her day in court in a treble damages Two and One Half Million Dollar default judgment entered against her, without determination of liability as to others who are alleged to be jointly liable and who are contesting their liability, but through erroneous characterization of the district court's action as a judgment certifiable as final,

and a usurpation of appellate jurisdiction, petitioner has also been denied the benefit of the potentially meritorious defenses of her co-defendants who may ultimately prevail upon the merits or succeed in avoiding treble damages or defeat substantial portions of the claimed damages. As this Court so aptly stated 112 years ago, "Such a state of things is unseemly and absurd, as well as unauthorized by law." Frow v. De La Vega, 15 Wall. 552, 82 U.S. 552, 21 L. Ed. 60 (1872). Petitioner has never asked for more than to simply have her day in court, and if she is not to be afforded this most fundamental of rights under our system of American jurisprudence, she should be afforded an ultimate resolution of this matter in a manner which is not incongruous and inconsistent with the remaining defendants. Throughout the proceedings below, petitioner has been denied the

benefit of even a single discretion. Where these denials rise to the level of disregard of the principles of finality and appealability and therefore the very jurisdiction of the Court, this Court should grant certiorari, intervene, and by exercising its supervisory powers, right this wrong.

Respectfully submitted,

ANN SHAVERS, Petitioner

BY: 
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[1]In her opening brief in the court of appeals, Mrs. Shavers immediately raised the jurisdictional problem in her "Statement of Jurisdiction," stating:

> [S]ince these "claims" involve concepts of liability necessarily dependent upon the liability of the others under alleged theories of fraud, conspiracy, and alleged violations of federal anti-racketeering statutes (RICO), Mrs. Shavers sharply disputes the finality of a default judgment entered against her alone with the litigation still pending against the remaining parties. See International Controls Corp. v. Vesco, 535 F.2d 742, 746-47 n. 4 (2nd Cir. 1976); Redding & Co., Inc. v. Russwine Construction Corp., 463 F.2d 929, 933 (D.C. Cir. 1972); Exquisite Form Industries, Inc. v. Exquisite Fabrics of London, 378 F. Supp. 403, 416 n. 19 (S.D. N.Y. 1974); In re Uranium Antitrust Litigation, 473 F. Supp. 382 (N.D. Ill. 1979), 617 F.2d 1248 (7th Cir. 1980); Frow v. De La Vega, 15 Wall. 552, 82 U.S. 552, 21 L. Ed. 60 (1872).

Brief for Appellant, p. 2.

The finality of the judgment was attacked throughout the body of her opening brief in the court of appeals (brief for appellant, pp. 23, 26-27, 44, and 47), again in her closing or reply brief (appellant's reply brief, pp. 3, 12-13, 21-22), and in her petition for rehearing and suggestion for rehearing en banc (petition for panel reh'g, pp. 2, 4-6, 14; sugg. for reh'g en banc, pp. iii-iv, 1, 6-10, 14). Recognizing that the briefs on appeal are ordinarily not a part of the record, these briefs nonetheless clearly indicate that a serious jurisdictional question was repeatedly

raised but was not addressed in the opinions of the court of appeals. Curiously, the appellee and respondent herein presented no argument or legal authorities whatsoever in opposition to Mrs. Shavers' argument that the district court action was not a certifiable judgment, and totally failed to address the issue in its brief. (Brief for Appellee).

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[2]Gillespie v. U. S. Steel Corp., 379 U.S. 148, 85 S. Ct. 308, 13 L. Ed. 2d 199 (1964); Brown Shoe Co. v. United States, 370 U.S. 294, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962); Catlin v. United States, 324 U.S. 229, 65 S. Ct. 631, 89 L. Ed. 911 (1945).

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[3]The default judgment is not an injunction, does not involve receiverships, is not in a bankruptcy proceeding, admiralty, or patent infringement. Otherwise nonappealable interlocutory orders may not be made "judgments" by certification since a "district court cannot, in the exercise of its discretion, treat as 'final' that which is not 'final' within the meaning of Section 1291." Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 76 S. Ct. 895, 100 L. Ed. 1297 (1956) (emphasis by this Court); McKinney v. Gannett Co., 694 F.2d 1240 (10th Cir. 1982); Painton & Co. v. Bourns, Inc., 442 F.2d 216 (2d Cir. 1971); Haverhill Gazette Co. v. Union Leader Corp., 333 F.2d 798 (1st Cir. 1964), cert. denied, 379 U.S. 931, 85 S. Ct. 321, 13 L. Ed. 2d 343 (1964); Bush v. United Benefit Fire Ins. Co., 311 F.2d 893 (5th Cir. 1963); Stewart v. Shanahan, 277 F.2d 233 (8th Cir. 1960); Luria Bros. & Co. v. Rosenfeld, 244 F.2d 192 (9th Cir. 1957); Flanagan v. Northern Lumber Co., 222 F.2d 539 (2d Cir. 1955); Kuly v. White Motor Co., 174 F.2d 742 (6th Cir. 1949).

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[4]Cuebas y Arrendondo v. Cuevas y Arrendondo, 223 U.S. 376, 32 S. Ct. 277, 56 L. Ed. 476 (1912).

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[5]Frow v. De La Vega, 15 Wall. 552, 82 U.S. 552, 21 L. Ed. 60 (1872).

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[6]Petitioner, in her Reply Brief in the court of appeals, and particularly in her Suggestion for Rehearing En Banc, expressly questioned whether Rule 54(b) certification could substitute for certification under 28 U.S.C. Section 1292(b) when appealability was governed by the latter but certification had been made under the rule rather than the statute. The following is ver batim language from the Suggestion for Rehearing En Banc presenting the issue as framed before the court of appeals:

> Does appellate jurisdiction lie in this Court where the district court erroneously certified as final under Rule 54(b) of the Federal Rules of Civil Procedure a judgment which could not be made final, in the absence of an express certification under 28 U.S.C. Section 1292(b) of the otherwise interlocutory matter?

Sugg. for Reh'g En Banc, p. iv.

The issue was extensively briefed in the Suggestion for Rehearing, including direct quotation of the specific authorities now relied upon in this petition. Sugg. for Reh'g En Banc, pp. 8-10.

> The finality of the judgment, and therefore its appealability, necessarily hinges upon whether it is a judgment in the first place.

CERTIFICATE OF SERVICE

I, GEORGE F. BLOSS, III, counsel for petitioner, do hereby certify that I have deposited in the United States Post Office three (3) true and correct copies of the foregoing Petition for Certiorari, with first class postage prepaid, addressed to MARGARET L. VANDERVALK, Esq., of the firm of Akin, Gump, Strauss, Hauer & Feld, Attorneys of record for respondent, at their record mailing address of 2800 Republic Bank Dallas Building, Dallas, Texas 75201, being the only party required to be served, on this, the 10th day of AUGUST, A.D. 1984.

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PETITION FOR WRIT OF CERTIORARI (APPENDICES)

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APPENDICES

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-1683

WALTER E. HELLER & COMPANY,
Plaintiff-Appellee,

versus

TYGER EQUIPMENT-INTERNATIONAL, INC., ET AL.,
Defendants,

ANN SHAVERS,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion APRIL 19, 5 Cir., 1984, ____F.2d ____)

(May 16, 1984)

Before GEE, POLITZ and JOHNSON, Circuit Judges

( ) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ HENRY A. POLITZ
United States Circuit Judge

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 83-1683
Summary Calendar

WALTER E. HELLER & COMPANY,
Plaintiff-Appellee,

versus

TYGER EQUIPMENT-INTERNATIONAL, INC., ET AL.,
Defendants,

ANN SHAVERS,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

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(APRIL 19, 1984)

Before GEE, POLITZ and JOHNSON, Circuit Judges.

POLITZ, Circuit Judge:

Ann B. Shavers appeals the denial of her motion for relief from a default judgment. Fed.R.Civ.P. 60(b). Finding no abuse of discretion by the trial court, we affirm.

Facts and Procedural Background

Walter E. Heller & Company sued

several defendants, including Hercules Concrete Pumps, Inc., Ann Shavers and her husband John Shavers, for breaches of leases and guaranties, fraud, negligent misrepresentation and violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68. The suit was based on two transactions in Texas involving Heller and Hercules. In May of 1983 Hercules was made the subject of an involuntary bankruptcy by its creditors. John Shavers immediately filed a voluntary petition in bankruptcy.

On May 5, 1983 Ann Shavers was personally served with the complaint. Service was also effected through the Secretary of State of Texas on May 19, 1983. She filed no response. On June 10, 1983, appellee filed its Motion for Default Judgment against Ann Shavers. A copy of the motion and a copy of the proposed judgment were forwarded to Ann

Shavers by certified mail but she refused to accept the package. In doing so, she followed the lead of her husband who refused certified mail from plaintiff's counsel from April 21, 1983 to June 15, 1983.

On July 1, 1983 appellee sought and secured a final judgment. Twenty-six days later Ann Shavers filed an appearance and answer. Thereafter she filed her Motion to Vacate Service of Process and to Set Aside Default Judgment.

At the time of the transaction upon which this litigation is based, Ann Shavers was Secretary of Hercules. John Shavers was its President. Ann Shavers traveled from her home in Mississippi to Texas on several occasions in conjunction with the business between Hercules and Heller. She conducted banking business for Hercules in Houston. She traveled to Dallas in the company plane to meet with

business associates. Hercules sold equipment in Texas, including the equipment which is at the core of this suit.

Discussion

A motion for relief from judgment under Rule 60(b) is addressed to the sound discretion of the district court. Hand v. United States, 441 F.2d 529 (5th Cir. 1971). The district court will be upheld absent a clear showing of abuse. Whittlesey v. Weyerhauser, 640 F.2d 739 (5th Cir. 1981). Shavers claims entitlement to relief under either 60(b)(1) or 60(b)(6). Those sections provide in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . or (6) any other reason justifying relief from the operation of the judgment.

The district court has wide discretion in entering a default judgment. Mason v.

Lister, 562 F.2d 343 (5th Cir. 1977). Before such a judgment will be vacated under Rule 60(b), the moving party "must show that there was good reason for the default and that he has a meritorious defense to the action." Gomes v. Williams, 420 F.2d 1364, 1366 (10th Cir. 1970).

Appellant claims that she was justified in her failure to respond timely. She maintains that she was without counsel and that she was ignorant of the processes of law and its requirements. She also claims personal and family stresses and distractions justified her inaction. The record belies these contentions. Appellant is college-educated with a background and experience in business matters. At the time of the instant default she was engaged in the pursuit of other legal and business affairs. The record does not support a finding of excusable neglect, mistake, inadvertence or surprise.

Appellant alternatively contends that she is entitled to relief under Rule 60(b)(6), the justice and equity provision. Transit Cas. Co. v. Security Trust Co., 441 F.2d 788 (5th Cir. 1971). Mindful of the liberal construction required to do substantial justice, Seven Elves, Inc. v. Eskenazi, 635 F.2d 396 (5th Cir. 1981), we examine appellant's contentions in light of the record facts.

Shavers maintains that the court lacks personal jurisdiction. This contention is totally devoid of merit. In this diversity action, jurisdiction is based on the Texas Long Arm Statute, Texas Revised Civil Statutes, art. 2031(b):

> For the purpose of this act, and without including other acts that may constitute doing business, any foreign corporation, joint stock company, association, partnership, or non-resident natural person shall be deemed doing business in this state by entering into contract by mail or otherwise with a resident of Texas to be performed in whole or in part by either party in

> this State, or the committing of any tort in whole or in part in this state. . . .

The Texas Supreme Court and this court have recognized that art. 2031(b) extends to the full limits allowed by the due process clause and it is not necessary that the suit arise out of the defendant's contacts with the forum "when the nonresident defendant's presence in the forum through numerous contacts is of such a nature . . . so as to satisfy the demands of the ultimate test of due process." Placid Investments, Ltd. v. Girard Trust Bank, 689 F.2d 1218, 1219 (5th Cir. 1982), quoting Hall v. Helicopters Nacionales de Colombia, 638 S.W.2d 870, 872 (Tex. 1982).

It is apparent that appellant was doing business in Texas for purposes of the Texas Long Arm Statute. Furthermore, the due process strictures are satisfied. As we recently noted:

> When a defendant purposefully avails himself of the benefits

> and protections of the forum's laws -- by engaging in activity in the state or engaging in activity outside the state that has reasonably foreseeable consequences in the state -- maintenance of the lawsuit does not offend traditional notions of fair play and substantial justice.

Prejean v. Sonatrach, Inc., 652 F.2d 1260, 1268 (5th Cir. 1981).

Finally, appellant claims improper service of process. This claim also is without merit. She was served personally and through the Secretary of State of Texas. Finding no merit in any contention and no abuse of discretion by the trial judge, see, Alvestad v. Monsanto, 671 F.2d 908 (5th Cir. 1982), we affirm the district court.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

WALTER E. HELLER & COMPANY	)	
	)	CA 3-83-
vs.	)	0253-C
	)	
TYGER EQUIPMENT-INTERNATIONAL, INC., ET AL	)	

O R D E R

The Court having considered Defendant Ann Shavers' Motion to Vacate Service of Process and to Set Aside Default Judgment, the response of the Plaintiff, and the briefs and supporting materials of the Parties and finding Defendant Ann Shavers has done business in Texas and that she has shown insufficient excuse for her failure to obey the summons of the Court,

Defendant Ann Shavers' Motion to Vacate Service of Process and to Set Aside Default Judgment is denied.

/s/ W.M. TAYLOR, JR.
UNITED STATES DISTRICT JUDGE

9/15/83
Date

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

WALTER E. HELLER AND COMPANY Plaintiff, v. TYGER EQUIPMENT-INTERNATIONAL, INC., TED Y. HATCH, individually and d/b/a TYGER QUIP OPERATIONS and/or B&H PROPERTIES, TYGERPUMP SERVICES, INC., TYGER QUIP OPERATIONS, B & H PROPERTIES, HERCULES CONCRETE PUMPS, INC., JOHN SHAVERS, and ANN SHAVERS, Defendants	)	CIVIL ACTION NO. 3 83-0253 C

FINAL JUDGMENT

On this the 1st day of July, 1983, came on to be heard Plaintiff Walter E. Heller and Company's Motion for Entry of Final Judgment as to Defendant Ann Shavers, pursuant to Rule 54(b), Fed.R.Civ.P. The Court having considered the Motion, the argument of counsel, and the pleadings and other records on file herein, finds that

Defendants Ann Shavers, John Shavers and Hercules Concrete Pumps, Inc. have engaged in a deliberate course of conduct designed to obstruct and impede the prosecution of this case; that delaying entry of final judgment against Ann Shavers until final trial as to the remaining Defendants in the case would create a probable danger that Defendant Ann Shavers would conceal, waste or otherwise dispose of assets available to satisfy Plaintiff's claims, and that Plaintiff would suffer prejudice from the delay of entry of final judgment. Therefore, the Court expressly determines that there is no just reason for delay in entering final judgment against Defendant Ann Shavers and expressly directs the entry of final judgment against Defendant Ann Shavers as set forth herein.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Plaintiff Walter E.

Heller and Company recover of Defendant Ann Shavers the sum of $2,425,593.72, reasonable attorneys fees and expenses in the amount of $90,471.32, and all costs of the action, with interest on these sums at the rate of 9.59% per annum from the 1st day of July, 1983 until paid.

SIGNED AND ENTERED this 1st day of July, 1983.

/s/ W. M. TAYLOR, JR.
UNITED STATES DISTRICT JUDGE

EXHIBIT E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

WALTER E. HELLER AND COMPANY Plaintiff,	)	
v.	)	CIVIL ACTION NO.
TYGER EQUIPMENT-INTERNATIONAL, INC., TED Y. HATCH, individually and d/b/a TYGER QUIP OPERATIONS and/or B&H PROPERTIES, TYGERPUMP SERVICES, INC., TYGER QUIP OPERATIONS, B & H PROPERTIES, HERCULES CONCRETE PUMPS, INC., JOHN SHAVERS, and ANN SHAVERS, Defendants	)	3 83-0253 C

ORDER

On this the 1st day of July, 1983, came on for consideration the recommendation of the United States Magistrate concerning the determination of the damages and attorneys fees to which Plaintiff is entitled against Defendant Ann Shavers, against whom a default was entered by the Clerk of this Court on June 10, 1983, and

the Court having considered the recommendation of the United States Magistrate is of the opinion that same should be approved.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Plaintiff Walter E. Heller & Company recover of Defendant Ann Shavers the sum of $2,425,593.72, attorneys fees in the amount of $90,471.32, costs of the action, with interest on these sums at the rate of 9.59% per annum from the 1st day of July, 1983 until paid.

SIGNED AND ENTERED this 1st day of July, 1983.

/s/ W. M. TAYLOR, JR.
U. S. DISTRICT JUDGE

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

WALTER E. HELLER & COMPANY	)	
VS.	)	CIVIL NO. CA-3-83-0253-C
TYGER EQUIPMENT-INTERNATIONAL, INC., ET AL	)	

RECOMMENDATION OF THE
UNITED STATES MAGISTRATE

Under authority of 28 U.S.C. §636(B) and the Local Rules of this Court, this action has been referred to the undersigned Magistrate for hearing and determination of the damages and attorneys' fees to which plaintiff is entitled against the defendant Ann Shavers, against whom a default was entered by the Clerk of this Court on June 10, 1983. A hearing was convened at 1:30 p.m. on June 24, 1983 as ordered by the Court in its Order of June 14, 1983, and only plaintiff appeared. Plaintiff presented testimony

by the Assistant Vice President of the plaintiff Walter E. Heller & Company who was responsible for the account which is the subject matter of this action. Testimony by that witness established that plaintiff suffered actual damages in the amount of $808,531.24, and that plaintiff further incurred attorneys' fees and direct expenses in the amount of $90,471.32 in the presentation and prosecution of this action. Testimony by Margaret Vandervalk, one of the attorneys for plaintiff established that Dallas counsel had performed legal work in this regard with a reasonable value of $68,651.52, and a firm in Biloxi, Mississippi had performed further legal work which had a reasonable value of $13,743. Counsel's testimony establishes that such amounts are reasonable and customary for like services performed by lawyers in Dallas and Biloxi, Mississippi. It thus

appears from the evidence that plaintiff's total damages, exclusive of attorneys' fees and expenses, are $808,531.24. Plaintiff brought this action alleging a pattern of racketeering activity as defined by 18 U.S.C. §1961(5). 18 U.S.C. §1964(c) provides that plaintiff in such a case shall be entitled to threefold the damages sustained and the costs of suit including a reasonable attorney's fee. Accordingly, plaintiff's actual damages of $808,531.24, when trebled, amount to damages in the amount of $2,425,593.72.

RECOMMENDATION:

I recommend that plaintiff be awarded damages in the amount of $808,531.24 with such amount trebled pursuant to the provisions of 18 U.S.C. §1964(c) to an amount of $2,425,593.72. I further recommend that plaintiff be awarded the sum of $90,471.32 as reasonable attorneys' fees and expenses incurred in the preparation

and prosecution of this action.

SIGNED this 24th day of June, 1983.

/s/ John B. Toller
UNITED STATES MAGISTRATE

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

WALTER E. HELLER & COMPANY, Plaintiff,	)	
versus	)	C/A No. 3-83-0253-C
TYGER EQUIPMENT-INTERNATIONAL, INC., TED Y. HATCH, INDIVIDUALLY, AND D/B/A TYGER QUIP OPERATIONS AND B & H PROPERTIES, TYGER-PUMP SERVICES, INC., HERCULES CONCRETE PUMPS, INC., JOHN SHAVERS AND ANN SHAVERS, Defendants.	)	

MOTION OF ANN SHAVERS TO
VACATE SERVICE OF PROCESS AND
TO SET ASIDE DEFAULT JUDGMENT

COMES NOW, your Defendant, ANN SHAVERS, by and through her undersigned attorneys, and pursuant to Fed. R. Civ. P. 60(b), respectfully moves this Honorable Court to set aside the Default Judgment rendered against her to vacate service of process and in support thereof would

respectfully show as follows, to-wit:

I.

That at the time that the Default Judgment was rendered against her, she was not represented by counsel; that she had no funds with which to pay and employ an attorney to represent her; that she attempted to act in her own behalf unknowingly, unwittingly, and inadvertently without advice of counsel, out of fear, and under great anxiety and apprehension, all of which contributed to her failure to appear without assistance of any legal counsel. That she now realizes her mistake and the severity of the effect the Default Judgment would have against her and her ability to raise her family which consists of one child, 11 years of age, and would impair her ability to earn a living. After having obtained legal counsel on this date, she now realizes her mistake in failing to appear, which

at the time of the rendition of the Judgment, she was mentally, physically, and financially unable to make an appearance with or without counsel on her behalf. That she was totally unaware of the legal aspects in the case against her in that she had no legal experience or training; that she was unaware that the process had upon her individually by way of substitute process was void; that she was totally ignorant and mistaken regarding the allegations that she was and had been at all times mentioned in the Complaint doing business individually within the State of Texas, particularly within the jurisdiction of this Honorable Court; that she was totally ignorant of the fact that she had a valid, legal defense to any judgment that may be brought against her individually due to the fact that she was not doing business in the State of Texas and amenable to

process and that venue was improper as to her individually; that upon a final hearing on this Motion, she desires to show by way of proof that she has never done business within the State of Texas nor within the jurisdiction of this Honorable Court as an individual; and that she has a valid and meritorious defense to this suit. Your Defendant, ANN SHAVERS, would further show that any business that she had within the State of Texas for and on behalf of the Defendant, HERCULES CONCRETE PUMPS, INC., was done at the instance and request of the president of HERCULES CONCRETE PUMPS, INC., consisting of nothing more than delivering papers, messages, etc., and did not engage in any policy- or decision-making actively at any time within the State of Texas for and on behalf of HERCULES CONCRETE PUMPS, INC. That the Judgment is unjust, inequitable, contrary to law, and unsupported by cogent

and reliable evidence, and it is against equity and good conscience to allow it to stand and be enforceed [sic]. That the Judgment was obtained by HELLER for harrassment [sic]. That the Plaintiff made the allegations against your Defendant in the Complaint in Paragraphs III(29-30) and (38-39) "on information and belief," which were unsupported allegations made by the Plaintiff.

In Paragraph III (38) the Plaintiff charged the Defendant with the violation of 18 U.S.C. §1961(5) all allegations being on information and belief and obviously unsupported by cogent evidence and all made in the reckless disregard for the truth and in a reckless disregard for the Defendant's rights and done with a willful and malicious intent to threaten, harrass [sic], and intimidate your Defendant in an attempt to collect treble damages from your Defendant and as a devious legal

devise [sic] on the Plaintiff's part in an unlawful and fraudulent scheme to get process on her and to bring within the jurisdiction of this Honorable Court as to process and venue by pleading 18 U.S.C. §1965.

Your Defendant would further show that the allegations contained in the Complaint are totally inadequate and insufficient to support the allegation of a violation by your Defendant of 18 U.S.C. §1961(5), and that all such allegations in violation of said section should be stricken.

For said reasons, she respectfully moves the Court to set aside the Default Judgment on the foregoing grounds and reasons, in that the Court had no in personam jurisdiction over her and that the venue of the court was improper and had no jurisdiction over the subject matter of the suit as to her individually.

WHEREFORE, PREMISES CONSIDERED, your Defendant, ANN SHAVERS, respectfully moves this Honorable Court to set aside the Default Judgment against her and to vacate service of process.

Respectfully submitted,

ANN SHAVERS, Defendant

BY: /s/ Oscar B. Ladner
OSCAR B. LADNER
Attorney for the Defendant

CERTIFICATE

I, Oscar B. Ladner, do hereby certify that I have this day mailed a true and correct copy of the within and foregoing Answer to the following:

1. Akin, Sump, Strauss, Hauer & Feld, counsel for the Plaintiff, at their usual post office address of 288 Republic Bank Dallas Building, Dallas, TX 75201;

2. Honorable James Persons, counsel for the Plaintiff, at his usual post office address of P. O. Box 1204, Biloxi, MS 39533;

3. Mr. Ted Y. Hatch, Defendant, at his usual post office address of 1306 Pine Tree Road, Suite 101, Longview, TX 75606;

4. Mr. John Shavers, Defendant, at his usual post office address of Highway 49 North, Gulfport, MS 39503; and

5. Honorable William Rigdon, counsel for the Defendant, JOHN SHAVERS, at his usual post office address of P. O. Box 2873, Laurel, MS 39440.

This, the 29th day of July, 1983.

/s/ Oscar B. Ladner
OSCAR B. LADNER

OSCAR B. LADNER, P. A.
Attorney and Counselor at Law
A Professional Association
2301 14th Street, Suites 206-207
Security-Markham Building
P. O. Box 727
Gulfport, MS 39501-0053
(601) 864-3926

OF COUNSEL:

HONORABLE G. DON SWAIN
LOUIS SANDBOATE, P. C.
Capital Bank Building, Suite 701
Dallas, TX 75206
(214) 823-2125

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

WALTER E. HELLER & COMPANY, Plaintiff,	§	
VS.	§	CIVIL ACTION NO. CA3-83-0253-C
TYGER EQUIPMENT-INTERNATIWNAL, INC., TED Y. HATCH, Individually and d/b/a TYGER QUIP OPERATIONS and/or B&H PROPERTIES, TYGERPUMP SERVICES, INC., TYGER QUIP OPERATIONS, B & H PROPERTIES, HERCULES CONCRETE PUMPS, INC., JOHN SHAVERS, and ANN SHAVERS, Defendants.	§	

MOTION FOR DEFAULT JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiff Walter E. Heller & Company hereby moves the Court to enter Default Judgment in favor of Plaintiff and against Defendant Ann Shavers for damages as pleaded in Plaintiff's First Amended Original Complaint on file herein inclu-

ding interest, costs and attorney's fees, and in support thereof would show the Court as follows:

1. The Clerk's Entry of Default has been entered into the Court's docket pursuant to Rule 55(a), Fed.R.Civ.Pro., and is incorporated by reference for all purposes as if fully set forth herein;

2. The Defendant Ann Shavers is not in the military service of the United States, as is shown by the Affidavit of Margaret L. Vandervalk, attached hereto as Exhibit "A".

3. In view of the default of Defendant Tygerpump Services, Inc., the only issues remaining to be determined as to said Defendant are:

(a) The amount of Plaintiff's damages; and

(b) Plaintiff's claim for allowance of Plaintiff's attorney's fees.

See Trans World Airlines, Inc. v. Hughes, 449 F.2d 51, 70 (2d Cir. 1971), rev'd on other grounds, 409 U.S. 363 (1973).

Accordingly, Plaintiff moves the Court to determine Plaintiff's damages and attorney's fees upon a hearing and to order entry of a judgment in favor of the Plaintiff against Defendant Ann Shavers, by reason of the matters and things alleged by Plaintiff in its First Amended Original Complaint in the amount as determined at the aforesaid hearing.

Respectfully submitted,

AKIN, GUMP, STRAUSS, HAUER & FELD

By: /s/ Sarah L. Scharnberg
Michael P. Lynn
Margaret L. Vandervalk
Sarah L. Scharnberg

2800 RepublicBank-Dallas Bldg.
Dallas, Texas 75201
(214) 655-2800

ATTORNEYS FOR PLAINTIFF
WALTER E. HELLER & COMPANY

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Motion for Default Judgment has been served on Defendant Ann Shavers by mailing a copy of same by certified mail, return receipt requested, to her at her residence, 4 Willow Circle, Route 6, Gulfport, Mississippi 79503, on this 10th day of June, 1983.

/s/ Sarah Scharnberg

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

WALTER E. HELLER & COMPANY, Plaintiff,	§	
VS.	§	
TYGER EQUIPMENT-INTERNATIONAL, INC., TED Y. HATCH, Individually and d/b/a TYGER QUIP OPERATIONS and/or B&H PROPERTIES, TYGERPUMP SERVICES, INC., TYGER QUIP OPERATIONS, B & H PROPERTIES, HERCULES CONCRETE PUMPS, INC., JOHN SHAVERS, and ANN SHAVERS, Defendants.	§	CIVIL ACTION NO. CA3-83-0253-C

CLERK'S ENTRY OF DEFAULT

This matter is before me on Plaintiff Walter E. Heller & Company's Request to Clerk for Entry of Default. Plaintiff's request shows as follows:

1. Defendant Ann Shavers has been duly served with summons and complaint in this matter on May 19, 1983.

2. Defendant Ann Shavers has failed to plead or otherwise defend as required by the federal rules.

Accordingly, upon application of the Plaintiff Walter E. Heller & Company, Default is hereby entered against Defendant Ann Shavers.

SIGNED and ENTERED this 10th day of June, 1983.

NANCY HALL DOHERTY
NANCY HALL DOHERTY,
UNITED STATES DISTRICT
CLERK

By: /s/ Marilyn Knehans

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

WALTER E. HELLER & COMPANY,	§	
Plaintiff,	§	
V.	§	CIVIL ACTION NO. CA3-83-0253C
TYGER EQUIPMENT-INTERNATIONAL, INC., TED Y. HATCH, individually and d/b/a TYGER QUIP OPERATIONS and/or B&H PROPERTIES, TYGERPUMP SERVICES, INC., TYGER QUIP OPERATIONS, B & H PROPERTIES, HERCULES CONCRETE PUMPS, INC., JOHN SHAVERS, and ANN SHAVERS,	§	(Jury Demanded)
Defendants.	§	

PLAINTIFF'S FIRST AMENDED COMPLAINT

WALTER E. HELLER & COMPANY, plaintiff herein, files this its First Amended Complaint and would respectfully show the following:

I.

PARTIES AND SERVICE

1. Plaintiff WALTER E. HELLER & COMPANY ("HELLER") is a Delaware corporation with its principal place of business in Chicago, Illinois.

2. Defendant TYGER EQUIPMENT-INTERNATIONAL, INC. ("TYGER") is a Texas corporation with its principal place of business in Longview, Texas. It may be served with process by serving Ted Y. Hatch, its registered agent, at its registered office, 1306 Pine Tree Road, Suite 101, Longview, Texas.

3. Defendant TYGERPUMP SERVICES, INC. ("TYGERPUMP") is a Texas corporation with its principal place of business in Longview, Texas. It may be served with process by serving its registered agent Ted Y. Hatch at 304 Cherokee Street, Longview, Texas.

4. Defendant TED Y. HATCH ("HATCH") is the Chairman and Chief Executive Officer of defendant TYGER. He may be

served with process at his business address, 1306 Pine Tree Road, Suite 101, Longview, Texas. HATCH is sued individually and doing business as TYGER QUIP OPERATIONS and B&H PROPERTIES.

5. Upon information and belief, TYGER QUIP OPERATIONS is a sole proprietorship of Defendant HATCH and may be served with process by serving HATCH at his place of business, 304 Cherokee Street, Longview, Texas.

6. Upon information and belief, B&H Properties is a sole proprietorship of Defendant HATCH and may be served with process by serving HATCH at his place of business, 304 Cherokee Street, Longview, Texas.

7. Defendant HERCULES CONCRETE PUMPS, INC. ("HERCULES") is a foreign corporation engaging in business in Texas, but having neither a regular place of business nor a designated agent for

service in Texas. Therefore, it may be served with process by serving the Texas Secretary of State pursuant to Article 2031(b), Tex. Rev. Civ. Stat. Ann. The principal place of business of HERCULES is Highway 49 North, Gulfport, Mississippi 39503.

8. Defendant JOHN E. SHAVERS ("SHAVERS") is the President of Defendant HERCULES and an individual engaging in business in Texas, but having neither a regular place of business nor a designated agent for service in Texas. Therefore, he may be served by serving the Texas Secretary of State pursuant to Article 2031(b), Tex. Rev. Civ. Stat. Ann. Defendant SHAVERS' business address is Highway 49 North, Gulfport, Mississippi 39503.

9. Defendant ANN B. SHAVERS ("A. SHAVERS") was the secretary of Defendant HERCULES at all times pertinent hereto and is a director of Defendant HERCULES

and an individual engaging in business in Texas, but having neither a regular place of business nor a designated agent for service in Texas. Therefore, she may be served by serving the Texas Secretary of State pursuant to Article 2031(b), Tex. Rev.Civ.Stat.Ann. Defendant A. SHAVERS' business address is Highway 49 North, Gulfport, Mississippi 39503 and her residence address is 4 Willow Circle, Gulfport, Mississippi.

10. Alternatively, Plaintiff prays that. pursuant to Rule 4(c), Fed. R. Civ. P., this Court grant its application for alternative service.

II.

JURISDICTION AND VENUE

11. Jurisdiction of this action is vested in this Court under 28 U.S.C. §1331.

12. Jurisdiction of this action is vested in this Court under 28 U.S.C. §1332.

13. Jurisdiction of this action is vested in this Court under 28 U.S.C. §1337.

14. Jurisdiction of this action is also vested in this Court under 18 U.S.C. §1964(c).

15. This Court also has pendent jurisdiction over the claims that arise out of the same facts and circumstances under the common law of the State of Texas.

16. Venue is proper in this district under 28 U.S.C. §§1391(a) (b) & (c), and 18 U.S.C. §1965.

III.

FACTUAL BACKGROUND

17. TYGER is in the construction and/or concrete business and has been in that business for approximately two years. HERCULES sells heavy equipment. HELLER is the assignee of equipment leases involving HERCULES equipment leased to TYGER. These

leases were originally entered into by The Walter E. Heller & Company Trust No. 1 as Lessor. The Walter E. Heller & Company Trust No. 1 is an entity through which HELLER engages from time to time in tax benefit leases. Both HELLER and The Walter E. Heller & Company Trust No. 1 act through the same agents, representatives and employees. For the sake of simplicity the acts of HELLER as agent of The Walter E. Heller & Company Trust No. 1 will hereinafter be described as the acts of HELLER.

18. In June 1982, Western Capital Investments, Inc., a broker, contacted HELLER concerning a potential lease transaction. TYGER proposed that HELLER advance funds to purchase new concrete pumping equipment from HERCULES and lease it to TYGER.

19. Upon receiving the lease applications from TYGER, HELLER asked for and

received credit information from TYGER and from HATCH. Some of that information was obtained through the United States mails and by interstate and intrastate telephone conversations.

20. On or about July 30, 1982, HATCH signed Lease No. 096966. A true and correct copy of that lease is attached hereto as Exhibit "A" and is incorporated herein as if set forth in full. On or about August 3, 1982, HATCH signed a Personal Guaranty, guaranteeing performance of Lease No. 096966. A true and correct copy of that Guaranty is attached hereto as Exhibit "B" and is incorporated herein as if set forth in full.

21. On or about July 20, 1982, HERCULES allegedly transferred the equipment to TYGER. On or about August 5, 1982, HELLER purchased the property described in Lease No. 096966 and TYGER certified that the property, as described

in the lease had arrived.

22. On or about August 23, 1982, HATCH signed Lease No. 097020. A true and correct copy of that lease is attached hereto as Exhibit "C" and is incorporated herein as if set forth in full. On or about August 24, 1982, HATCH signed a Personal Guaranty, guaranteeing performance of Lease No. 097020. A true and correct copy of that Guaranty is attached hereto as Exhibit "C" and is incorporated herein as if set forth in full. On August 23, 1982, HATCH also certified that he had received the equipment described by Lease 097020 which allegedly had been transferred by HERCULES on or about August 19, 1982.

23. Prior to signing Lease Nos. 096966 and 097020, HELLER representatives located in Dallas, Texas, telephoned HERCULES in Mississippi to confirm that the equipment sold to TYGER was new and

indeed was being shipped to TYGER. HERCULES, through its President Shavers confirmed to HELLER that the equipment in Lease Nos. 096966 and 097020 was new.

24. Prior to HELLER's acceptance of Lease No. 097020, HELLER asked to inspect the concrete pumping equipment to be leased under Lease No. 097020 which had allegedly already been transferred by HERCULES to TYGER. A representative of HELLER travelled to South Padre Island, Texas where SHAVERS and a representative of TYGER pointed out a piece of concrete pumping equipment which bore a label identifying it as the make, model and serial number of the HERCULES equipment covered by Lease No. 097020. Upon information and belief, the equipment shown the HELLER representative was actually a Schwing concrete pump with a stick-on HERCULES label affixed to it, which TYGER had leased from Hercules Concrete Pumping

Service, Inc., an entity unrelated to Defendant HERCULES.

25. Upon information and belief, TYGER and HATCH negotiated and entered the equipment leasing transactions with HELLER to acquire pumps to be used by TYGERPUMP, the entity which physically engages in concrete pumping work.

26. On or about December 1982, TYGER's rental checks were returned to HELLER showing insufficient funds to cover payment of the checks.

27. Upon investigation of TYGER's nonpayment, HELLER discovered that the new equipment purportedly the subject of Lease Nos. 096966 and 097020 and purportedly in the possession of TYGER was not the equipment TYGER had in its possession.

28. On information and belief, HELLER alleges that HERCULES, in collusion with TYGER and TYGERPUMP, either failed to transfer any equipment to TYGER or

transferred to TYGER used equipment with identification numbers indicating it was new equipment, or transferred new equipment to TYGER and thereafter aided TYGER in switching the identification to older equipment.

29. In either case, on information and belief, HATCH, SHAVERS and A. SHAVERS through TYGER, TYGERPUMP and HERCULES either had HELLER purchase non-existent or used equipment or substituted used equipment for the new equipment they represented that HELLER purchased and did so intentionally to defraud HELLER and other equipment leasing companies out of funds HELLER and others had invested.

30. Upon information and belief, HERCULES through SHAVERS and A. SHAVERS kicked back a portion of the equipment purchase price paid by HELLER and other equipment lessors to TYGER and HATCH by making payments to B&H Properties and/or

HATCH. Portions of those payments were in turn transferred to TYGER, TYGERPUMP, TYGER QUIP and HATCH personally. Also upon information and belief, SHAVERS and A. SHAVERS have received payments of funds from HERCULES that were paid to HERCULES by HELLER and other equipment lessors.

31. Plaintiff, on information and belief, alleges that Defendants have or will destroy documents relating to the above transactions.

IV.

CLAIMS FOR RELIEF

32. Breaches of Leases and Guaranties. Plaintiff incorporates herein by reference and realleges paragraphs 1 through 30.

33. Defendant TYGER failed to make the November 1, 1982 lease payment then due and owing on Lease No. 096966 and Lease No. 097020, and has failed and refused to make each and every monthly

payment since due under both leases, up to and including the time of filing of this cause of action. Its failure to make the monthly payments constitutes a breach of said lease agreements and an event of default under the leases.

34. Defendant TYGER has also, by its failure to make the monthly lease payments when due, incurred late payment penalties pursuant to the terms of the leases in the amount of $916.60.

35. As a result of the above-described defaults, rentals for the entire lease term became due in accordance with the terms of Lease No. 096966 and Lease No. 097020 and the entire amount of the unpaid total rental for the balance of the term of each lease became immediately due without notice. Pursuant to the terms of the leases and the guaranty agreements, there are now due and payable by Defendants TYGER and HATCH rentals in the sum

of $346,891.04 under Lease No. 096966, and $362,527.24 under Lease No. 097020, and late charges in the amount of $916.60 with interest on these sums at the highest legal rate (not to exceed 1-1/2% per month) from the date of default until judgment, for which plaintiff now seeks recovery.

36. Alternatively, if Plaintiff should recover possession of the equipment and re-lease or sell the equipment to a third party, Defendants TYGER and HATCH are liable, pursuant to the provisions of Section 16 of the leases, for (1) the deficiency of the balance of rental payments remaining after such re-lease or sale, (2) all costs and expenses of repossession and re-lease or sale of the equipment, (3) an amount equal to 20% of the equipment's original cost to Lessor as liquidated damages for Lessor's loss of its residual salvage value at the normal

expiration of the lease, and (4) amounts due under Section 17 of the lease for Lessor's loss of investment tax credits and depreciation deductions, plus interest at the highest legal rate (not to exceed 1-1/2%) on all such sums not paid from the date such sums are incurred until judgment.

37. In accordance with the terms of the lease agreement, Defendants TYGER and HATCH are liable to Plaintiff for expenses incurred by Plaintiff in connection with the enforcement of Plaintiff's remedies, including reasonable attorneys' fees (not less than 20% of the amount due) and all expenses of repossessing and disposing of the equipment, together with interest on such sums at the highest legal rate (not to exceed 1-1/2%) from the date such sums are due until paid. Said Defendants are also liable for reasonable attorneys' fees pursuant to the provisions of Tex.

Rev. Civ. Stat. Ann. Art. 2226.

38. Racketeer Influenced and Corrupt Organization Act (RICO). Plaintiff incorporates herein by reference and realleges paragraphs 1 through 37.

39. Defendants' fraudulent acts, omissions, and misrepresentations in connection with the formation of the lease contracts and regarding the equipment leased, occurred, and were accomplished, by and through Defendants' use on numerous occasions of the instrumentalities of the mails and wires of interstate commerce in communicating with officers and agents of Plaintiff.

40. Defendant TYGER's fraudulent omissions and misrepresentations regarding its financial status and solvency and the nature of the equipment leased to TYGER were accomplished by and through TYGER's use of the instrumentalities of the mails and wires of interstate commerce on at

least two separate occasions. Such conduct is within the definition of "pattern of rackeetering [sic] activity" under 18 U.S.C. §1961(5).

41. Defendant HATCH's fraudulent omissions and misrepresentations regarding his financial status and solvency and the nature of the equipment leased to TYGER were accomplished by and through HATCH's use of the instrumentalities of the mails and wires of interstate commerce on at least two separate occasions. Such conduct is within the definition of "pattern of racketeering activity" under 18 U.S.C. §1961(5).

42. Defendants HERCULES', SHAVERS' and A. SHAVERS' fraudulent omissions and misrepresentations regarding the existence and/or origin of the leased equipment were accomplished by and through their use of the instrumentalities of the mails and wires of interstate commerce on at lease

[sic] two separate occasions. Such conduct is within the definition of "pattern of racketeering activity" under 18 U.S.C. §1961(5).

43. Upon information and belief, Defendants engaged in similar fraudulent acts, omissions and misrepresentations in connection with the formation of lease contracts with other equipment lessors, including but not limited to Baldwin United Leasing Company, Dresser Leasing, Manufacturer's Hanover, First City Leasing of Houston, LEXCO Leasing Corporation, and Marine Bank of Milwaukee. Moreover, Defendants HERCULES, SHAVERS and A. SHAVERS engaged in a similar fraudulent scheme to defraud equipment lessors in connection with American Concrete Pumping, Inc. of Longview, Texas. These fraudulent acts, omissions and misrepresentations occurred, and were accomplished, by and through Defendants' use on numerous

occasions of the instrumentalities of the mails and wires of interstate commerce in communicating with these other equipment lessors. Such conduct is within the definition of "pattern of racketeering activity" under 18 U.S.C. §1961(5).

44. Upon information and belief, Defendants HATCH, SHAVERS and A. SHAVERS, through TYGER, TYGERPUMP and HERCULES, and American Concrete Pumping, Inc. engaged in a wide-ranging conspiracy to defraud equipment lessors by creating a fictitious market for Hercules concrete pumping equipment. TYGER and/or TYGERPUMP and American Concrete Pumping, Inc., either directly or through brokers, approached the lessors and requested that they buy new Hercules concrete pumping equipment and lease it to TYGER, TYGERPUMP and/or American Concrete Pumping, Inc. for use in their concrete pumping businesses. SHAVERS, A. SHAVERS and HERCULES would then sell to the equip-

ment lessors reconditioned and/or non-existent Hercules concrete pumping equipment which all parties -- HATCH, SHAVERS, A. SHAVERS, HATCH, TYGER, TYGERPUMP and American Concrete Pumping, Inc. -- falsely represented to be new, existing Hercules concrete pumping equipment. This fraudulent enterprise was funded at least in part with monies derived from the initial fraudulent sales of concrete pumping equipment.

45. Upon information and belief, Defendants received income, substantial benefits, and value derived, directly or indirectly, from the fraudulent acts complained of herein and used or invested, directly or indirectly, some part of such income, benefits, and value, or the proceeds thereof, in the acquisition of interests in, and/or in the establishment and/or operation of, an enterprise or enterprises engaged in interstate commerce

or whose activities affect interstate commerce, in violation of 18 U.S.C. §1962.

46. Upon information and belief, Defendants, through the fraudulent acts complained of herein, acquired or maintained, directly or indirectly, an interest in and/or control of an enterprise or enterprises engaged in, or whose activities affect, interstate commerce, in violation of 18 U.S.C. §1962.

47. Upon information and belief, from approximately June 1982 and continuously thereafter up to and including the date of the filing of this complaint, Defendants HATCH, SHAVERS and A. SHAVERS, individually and through Defendants TYGER, TYGERPUMP and HERCULES, did unlawfully, willingly, and knowingly agree and conspire to derive income fraudulently from Plaintiffs and others through a pattern of racketeering activity. Through this pattern of racketeering activity,

Defendants agreed and conspired to violate 18 U.S.C. §1962(a), (b) and (c).

48. As a direct and proximate consequence and by reason of the foregoing acts and practices, Plaintiff was injured in its business or property and suffered damages, including lost lease payments and lost profits in the amount of at least six hundred thousand dollars, which Plaintiffs are entitled to have trebled under 18 U.S.C. §1964(c). Pursuant to 18 U.S.C. §1964(c) Plaintiff is also entitled to recover its costs of suit and reasonable attorney's fees.

49. Common Law Fraud. Plaintiff incorporates paragraphs 1 through 48 as if set forth in full.

50. Defendants HATCH at TYGER and SHAVERS and A. SHAVERS at HERCULES misrepresented that HELLER was purchasing new equipment. HATCH and TYGER additionally misrepresented that the equipment

would be preserved, maintained and protected during the lease, and that HATCH and TYGER were financially sound and as represented on certain balance sheets supplied to Plaintiff.

51. The above statements were false, were made recklessly, willfully or with the intent to deceive.

52. The above statements were relied upon by the Plaintiff and caused Plaintiff damages in excess of $10,000.00.

53. Plaintiff has suffered out-of-pocket damages of approximately $500,000.00 plus loss of interest thereon.

54. Negligent Misrepresentations. HELLER incorporates paragraphs 1 through 53 as if set forth in full.

55. Alternatively, HELLER alleges that Defendants were under a duty of care to provide accurate information to Plaintiff and have been negligent in making representations of their financial

worth and well being, as well as the existence and/or condition and age of the equipment purportedly sold to HELLER, when they knew that those representations would be and were relied upon by HELLER in consummating the lease transactions.

56. As a proximate result of Defendants' negligent misrepresentations, Plaintiff has suffered damages in excess of $10,000.00.

57. Exemplary Damages. Plaintiff incorporates paragraphs 1 through 56 as if set forth in full.

58. Defendants have acted with legal malice in defrauding HELLER, or alternatively, have acted with such gross negligence that Plaintiff is entitled to punitive damages of at least the following amounts:

TYGER	--	$4,000,000.00
HERCULES	--	$6,000,000.00
HATCH	--	$2,000,000.00
SHAVERS	--	$2,000,000.00
A. SHAVERS	--	$2,000,000.00

59. Conspiracy to Aid and Abet TYGER. Plaintiff incorporates paragraphs 1 through 56 as if set forth in full.

60. HATCH, TYGER and TYGERPUMP acting in conspiracy with SHAVERS, A. SHAVERS and HERCULES did conspire to defraud HELLER as more particularly described above and did defraud HELLER of lease payments, collateral, and money in excess of $10,000.00.

61. Said conspiracy was willful and was engaged in with legal malice. Hence Plaintiff prays for punitive damages as set forth in paragraph 58.

62. Irreparable Injury. Plaintiff will suffer immediate and irreparable injury should the preliminary injunction prayed for hereinbelow not be granted in that Defendants, upon information and belief, have already conspired to conceal or dispose of some of the new equipment sold to Plaintiff, and if not enjoined

may secrete, waste or destroy Plaintiff's property and all records of their prior wrongdoing. Plaintiff has no adequate remedy at law.

63. Attorneys' Fees. Pursuant to the lease agreements, 18 U.S.C. §1964(c) and Article 2226 Tex. Rev. Civ. Stat. Ann., Plaintiff prays for reasonable and necessary attorneys' fees.

V.

PRAYER

64. For the above reasons, Plaintiff prays:

a. that Defendants be cited to appear.

b. that Defendants, their agents, employees, successors, assignees, and representatives be preliminarily and finally enjoined from directly or indirectly engaging in:

1. the destruction, secretion, alienation, removal, conversion, or

disposition of the property more particularly described on each lease;

2. the destruction, secretion, removal, or disposition of records and documents that relate to the above-described lease transactions; and further breaches of the above-described lease agreements, resulting in further pecuniary loss to Plaintiff in the form of lost rental payments and lost profits.

c. Because of Defendants' fraud against Plaintiff, the Court should impose a constructive trust for the benefit of Plaintiff on any proceeds from the monies Plaintiff paid to Defendant HERCULES, and as any proceeds from Defendants' sale, conversion, or other disposition of the leased equipment.

d. Upon trial, the Court award Plaintiff damages as requested above.

e. Upon trial, the Court award

Plaintiff treble damages as requested in paragraph 48 above.

f. Upon trial, the Court award punitive damages as requested above.

g. Upon trial, the Court award attorneys' fees and court costs as well as all pre and post trial interest as required by law.

h. Upon trial, the Court award other relief as to which Plaintiff may show itself entitled.

Respectfully submitted,

/s/ Margaret L. Vandervalk
Michael P. Lynn
Margaret L. Vandervalk
Sarah Scharnberg

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Of Counsel:

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(601) 435-3632

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Plaintiff's First Amended Complaint, has been sent, by certified mail, return receipt requested, to Mr. Ted Y. Hatch, 211 East Methvin, Longview, Texas 75606, to Mr. John Shavers, Highway 49 North, Gulfport, Mississippi 39503, and to Mr. William Rigdon, P. O. Box 2873, Laurel, Mississippi 39440, on this 27th day of April, 1983.

/s/ Margaret L. Vandervalk
Margaret L. Vandervalk

APPENDIX K

Fed. R. Civ. P. 54

RULE 54. Judgments; Costs

(a) Definition; Form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) Demand for Judgment. [Omitted as not pertinent].

(d) Costs. [Omitted as not pertinent].

APPENDIX L

28 U.S.C.S. § 1292

§ 1292. Interlocutory decisions.

(a) [Omitted as not pertinent].

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

(c) [Omitted as not pertinent].

(d) [Omitted as not pertinent].

APPENDIX M

FED. R. CIV. P. 60(b)

RULE 60. RELIEF FROM JUDGMENT OR ORDER

(a) [Omitted as not pertinent].

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U. S. C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

CERTIFICATE OF SERVICE

I, GEORGE F. BLOSS, III, counsel for petitioner, do hereby certify that I have deposited in the United States Post Office three (3) true and correct copies of the foregoing APPENDICES to Petition for Certiorari, with first class postage pre-paid, addressed to MARGARET L. VANDERVALK, Esq., of the firm of Akin, Gump, Strauss, Hauer & Feld, Attorneys of record for the respondent, at their record mailing address of 2800 Republic Bank Dallas Building, Dallas, Texas 75201, being the only party required to be served, on this, the 10th day of AUGUST, A.D. 1984.

George F. Bloss III

GEORGE F. BLOSS, III,
Counsel for Petitioner

GEORGE F. BLOSS, III, P.A.
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(601) 868-8660

No. 84-252

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ANN SHAVERS,
Petitioner,

v.

WALTER E. HELLER & COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MARGARET L. VANDERVALK
AKIN, GUMP, STRAUSS, HAUER & FELD
2800 RepublicBank Dallas Building
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(214) 655-2800

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED FOR REVIEW

1. Does this Court have jurisdiction to consider the finality of a judgment properly entered in accordance with Rule 54(b), Fed.R.Civ.P. when the judgment itself was not appealed, but an appeal of an order denying relief under Rule 60(b), Fed.R.Civ.P. was prosecuted instead, and when the issue of finality was neither presented to the trial court nor adjudicated by the court of appeals?

2. In the alternative, if this Court has jurisdiction to consider the finality of the judgment underlying the Rule 60(b) order, does the fact that there are multiple defendants in the original suit vitiate the finality of the judgment against Petitioner when the proven allegations against her provide a basis for individual, as well as joint, liability?

PARTIES TO THE PROCEEDINGS

The only parties to the judgment of which review is sought are the parties named in the caption to the petition in this Court. The additional parties named by Petitioner are other defendants to the original suit filed in the district court, but are not parties to any judgment which may now be before this Court.

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JURISDICTION OF THIS COURT

Although Petitioner claims that jurisdiction is vested in this Court under 28 U.S.C. § 1254(l) to review the actions of the district court and the court of appeals, including the finality of the district court's judgment, Respondent contends that this Court does not have jurisdiction to review the questions presented by Petitioner, as those issues are not, and have never been, properly "in" the court of appeals, as required by 28 U.S.C. § 1254. Nevertheless, should the Court determine it does have jurisdiction, Respondent will also show that Petitioner's arguments herein are without merit.

STATEMENT OF THE CASE

On July 1, 1983, the U. S. District Court for the Northern District of Texas entered a final judgment against the Peti-

tioner. Upon Respondent's request, the clerk had entered a default against Petitioner on June 10, 1983 after she had failed to answer or to make any appearance in response to service of Respondent's First Amended Complaint which named her as a defendant. Judgment was certified as final pursuant to Rule 54(b), Fed.R.Civ.P., the court having found no just reason for delay and expressly directing entry of the judgment. Indeed, the district court explicitly stated it perceived a probable danger that Petitioner "would conceal, waste or otherwise dispose of assets available to satisfy Plaintiff's claims, and that Plaintiff would suffer prejudice from the delay of entry of final judgment." A copy of the judgment was mailed to Petitioner on July 1, 1983 by certified mail but she did not accept delivery until July 15, 1983. Thus, she had at least 15 days in which to notice an appeal of the judgment, which she failed to do. (Petitioner's Appendix D.)

Rather than appeal, Petitioner chose to file an Answer in the district court on July 26, 1983, some six days before the time to appeal expired. Then, on August 3, 1983, she filed a Motion to Vacate Service of Process and to Set Aside the Judgment, pursuant to Rule 60(b), Fed.R.Civ.P.[1] The district court denied the Motion, determining that Petitioner "has done business in Texas and that she has shown insufficient excuse for her failure to obey the summons of the Court." (Petitioner's Appendix C.)

The grounds stated in Petitioner's Motion to set aside the judgment purported to derive from Rule 60(b), subsections

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[1]The date of the certificate of service attached to the motion is July 29,1983. Thus, Petitioner prepared this motion within the time which would be allowed under Fed.R.App.P. 4(a)(1) to notice an appeal. Morever, she filed it within the time during which she could have sought an extension of her time for appeal, pursuant to Fed.R.App.P. 4(a)(5).

(1) (mistake, inadvertence, surprise or excusable neglect), (3) (misconduct of the adverse party), (4) (voidness of the judgment due to insufficient service of process), and (6) (that it would be generally unfair to enforce the judgment), although the subsections were not identified or discussed with any specificity. (*See* Petitioner's Appendix G.) Nowhere in her motion did Petitioner raise the issue of whether the judgment was indeed a final one, i.e., whether it should have been certified as final pursuant to Rule 54(b), which is the issue Petitioner seeks to have this Court review. Indeed, Rule 60(b), by its terms, is applicable only to final judgments.

Petitioner disputes the finality of the 54(b) judgment primarily on the ground that it would be incongruous to hold only one defendant liable in a suit alleging conspiracy. However, the Petitioner assumes inaccurately that the judgment entered against her on July 1, 1983 rests solely on acts for which there could be only joint liability. In fact, Respondent's First Amended Complaint, in which the Petitioner was joined as a defendant, alleges conduct by the Petitioner which depends in no way on the actions of the other defendants, or on a conspiracy between or among the defendants. Although the Complaint contains a conspiracy allegation, it also outlines conduct by the individual defendants which may or may not have been collusive, such as fraudulent omission and misrepresentations made to the Respondent. (*See* Petitioner's Appendix J.)

On September 15, 1983, the district court entered an order denying Petitioner's Rule 60(b) motion and she filed a timely notice of appeal of that order. In her jurisdictional statement to the court of appeals, Petitioner relied on Rule 60(b), and on 28 U.S.C. § 1291, which vests appellate jurisdiction over final judgments in the courts of appeals. The Fifth Circuit, finding no abuse of discretion by the trial

court, affirmed the district court's order denying relief (Petitioner's Appendix B), and subsequently refused to rehear the matter, en banc or otherwise. (Petitioner's Appendix A.)

Petitioner's murky presentation of the posture of this case leads her to the inaccurate conclusion that the Fifth Circuit Court of Appeals "assumed jurisdiction" of this case. The implication of the quoted language is that the court of appeals did not rightly have jurisdiction of the issue before it, viz., Rule 60(b). The fact is that a proper notice of appeal was filed by the Petitioner from the 60(b) ruling of the district court, and there can be no question that the court of appeals had jurisdiction to review the validity, under the applicable "abuse of discretion" standard, of the lower court's denial of relief. That is precisely what the court of appeals did, as its opinion makes clear. It never at any time "affirm[ed]" (Petition, pp. 6, 7, 8, 14) the judgment against the Petitioner, because it never had jurisdiction to review the judgment, no appeal from that judgment ever having been taken.

For the reasons outlined below, wherein Respondent will show that this Court does not have jurisdiction to review the questions presented by Petitioner, or, alternatively, that the judgment is a final one, Respondent respectfully requests that writ of certiorari be denied.

DISTRICT COURT JURISDICTION

In addition to the sources of the district court's jurisdiction named in the petition, jurisdiction was also vested in that court under 28 U.S.C. § 1337, for cases involving Acts of Congress regulating commerce, and 18 U.S.C. § 1964(c), the Racketeer Influenced and Corrupt Organizations Act (RICO).

SUMMARY OF ARGUMENT

This Court lacks jurisdiction to review the questions presented by Petitioner. Those questions seek review of the

issue of finality of a judgment properly entered against Petitioner pursuant to Rule 54(b), Fed.R.Civ.P. Because that judgment was not appealed, however, it is not and never has been "in" the court of appeals. Thus, the question of its finality is not before this Court and is beyond review.

Petitioner seeks to circumvent her failure to appeal by coming to this Court via the collateral route of Rule 60(b), Fed.R.Civ.P. Pursuant to that Rule, she filed a motion to set aside the judgment on grounds unrelated to its finality. It was the denial of the Rule 60(b) motion which she appealed, and which the court of appeals affirmed. It is well established that the appeal of the denial of a Rule 60(b) motion does not bring up the underlying judgment for review. *Browder v. Director, Department of Corrections of Illinois*. 434 U.S. 257, 263 n.7 (1978), *reh'g den.*, 434 U.S. 1089 (1978). Moreover, even if finality could be considered in the Rule 60(b) context, grounds for relief not raised in the trial court are not preserved for review on appeal, *Singleton v. Wulff*, 428 U.S. 106, 120 (1976), nor for review by this Court, *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *Rugendorf v. United States*, 376 U.S. 528, 534 (1964), *reh'g den.*, 377 U.S. 940 (1964).

Because the 54(b) judgment and its finality are not before this Court, any issue relative to the interaction between Rule 54(b) and 28 U.S.C. § 1292(b), providing for certain interlocutory appeals, is not before this Court. There was never any need for the court of appeals to take jurisdiction of Petitioner's case under the authority of § 1292(b) because the court of appeals did not undertake to review an interlocutory judgment. That court was only reviewing the unquestionably final and appealable denial of Rule 60(b) relief.

Even if this Court concludes it does have jurisdiction to review Petitioner's questions, there are other reasons

weighing against a grant of certiorari. First, the decision as to whether to certify a judgment as final is vested in the discretion of the trial court, *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 437 (1956), and should be afforded substantial deference. *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 10 (1980).

Additionally, the 54(b) judgment is a final one, ultimately disposing of claims of liability and fixing damages. The judgment is not rendered nonfinal simply because the Respondent's Complaint alleged causes of action which would support joint liability. The Complaint also alleged conduct which results in joint and several liability, so that there is nothing incongruous about enforcement of the judgment against Petitioner alone.

REASONS FOR DENYING THE WRIT

I. This Court Has No Jurisdiction to Review the Questions Presented by the Petitioner

A. The Underlying 54(b) Judgment Was Not Appealed

It is long and well-established that "a review of the sources of the Court's jurisdiction is a threshold inquiry appropriate to the disposition of every case that comes before [it]." *Brown Shoe Co. v. United States*, 370 U.S. 294, 305-6 (1962). Such an inquiry in the instant case reveals that this Court lacks jurisdiction to consider the case as it has been presented by the Petitioner.

Petitioner has invoked jurisdiction under 28 U.S.C. § 1254, which provides that review may be had of cases which are in the courts of appeals. A case is properly "in" a court of appeals when a final judgment has been rendered by a court below and a timely notice of appeal has been filed. *United States v. Nixon*, 418 U.S. 683, 690 (1974). The only aspect of the case at bar as to which both of those require-

ments have been met is the district court's order denying Petitioner's motion, pursuant to Rule 60(b), Fed.R.Civ.P., to set aside the judgment which had been certified and entered in accordance with Rule 54(b), Fed.R.Civ.P.[2] The judgment itself was final, but no appeal from it was ever taken. Thus, any issues concerning the merits of the 54(b) judgment (rather than collateral to it), such as the issues presented by Petitioner for review, are *not* in the court of appeals, and thus are outside the jurisdiction of this Court. *See The Boeing Company v. Van Gemert*, 444 U.S. 472, 479 n.5 (1980) (where Petitioner did not appeal an aspect of a final and appealable judgment, that issue was not considered by the Court).

The two questions which Petitioner has presented for review have a common core. They both seek an answer from this Court as to whether the judgment entered by the district court pursuant to Rule 54(b) is truly a final judgment. Those questions might have been appropriate ones for this Court to address, had the judgment itself been appealed. If it had been appealed, and if the Fifth Circuit had concluded that the judgment lacked finality, that court would have dismissed the appeal for want of jurisdiction. *See Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737, 750 (1976). On the other hand, if the Court of Appeals had affirmed the judgment, this Court would have then been in a position to review the issue of finality of the judgment. *Id.*

These conditional states of affairs are irrelevant, however, because the fact is that no appeal of the underlying judgment was ever taken. Thus, no higher court—neither the court of appeals nor this Court—has ever had jurisdiction to review the judgment, or even to determine whether there

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[2]The Fifth Circuit, finding no abuse of discretion, affirmed this denial of collateral relief under 60(b).

was appellate jurisdiction to review it. Since the failure to take a timely appeal justifies dismissal of an appeal subsequently taken, *Pittsburgh Towing Co. v. Mississippi Valley Barge Line Co.*, 385 U.S. 32 (1966), *reh'g den.*, 385 U.S. 995 (1966), it follows *a fortiori* that the failure to appeal at all effectively constitutes a waiver of review as to all aspects of the judgment, including finality. Petitioner, having failed to appeal the underlying judgment, cannot now bring the question of its finality before this Court.

B. A 60(b) Motion is Not a Substitute for Appeal

Mrs. Shavers' petition for writ of certiorari purports to fault the Fifth Circuit Court of Appeals for not responding to her arguments as to the finality of the 54(b) judgment. (Petition, pp. 6, 17) Moreover, in several places, the Petitioner contends that the Fifth Circuit *affirmed* that judgment. (Petition, pp. 6, 7, 8, 14). Petitioner's position on these points reveals either a failure to understand the posture of this case or an affirmative effort to misrepresent that posture in an attempt to gain review of issues which have been waived because they were not appealed.

It is true that the court of appeals did not respond to Petitioner's arguments on finality. It is not true that the court of appeals affirmed the judgment. The reason underlying both of these facts is the same: the court of appeals had no jurisdiction, for the reasons outlined in the preceding section of this discussion, either to consider finality arguments or to affirm the underlying 54(b) judgment. The court of appeals only had jurisdiction to determine whether the district court's denial of relief under Rule 60(b) constituted an abuse of discretion, because only the Rule 60(b) order was before it on appeal. And *only* that order was affirmed.

The Court of Appeals took the proper and legal course when it ignored the issue of finality of the underlying judg-

ment in the context of the 60(b) appeal. This is so for a number of reasons. First, quite simply, the issue was not raised by Petitioner in her 60(b) motion to the district court.[3] The principle is fundamental that an issue not raised before the trial court is not preserved for review, either by the appellate court, *Singleton v. Wulff*, 428 U.S. 106, 120 (1976), or by the Supreme Court, *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *Rugendorf v. United States*, 376 U.S. 528, 534 (1964), *reh'g den.*, 377 U.S. 940 (1964).

Second, even had the issue of finality been presented to the trial court in the 60(b) motion, Rule 60(b) does not contemplate review of such an issue, either by the trial court or any higher court. By its own terms, the Rule allows for collateral relief from "final" judgments.

Third, and most important to this case, is that if the court of appeals had considered and adjudicated the finality issue, it would have been overstepping the bounds of its authority, and, in effect been reviewing the underlying judgment itself. "While a 60(b) motion to set aside judgment is to be 'construed liberally to do substantial justice' [citation omitted], *it is not a substitute for appeal.*" *Fackelman v. Bell*, 564 F.2d 734, 735 (5th Cir. 1977) (emphasis added). Mrs. Shavers, in her appeal to the Fifth Circuit and in her petition to this Court, has been and is attempting to contravene that principle, viz., to use her 60(b) motion and her appeal from its denial as a substitute for the appeal of the underlying judgment which she failed to take. It is well-settled that "an appeal from denial of Rule 60(b) relief does not bring up the underlying judgment for review." *Browder v. Director,*

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[3]The motion was not specific in its terms, but purported to raise several of the grounds for relief set out in Rule 60(b), e.g., mistake, excusable neglect, invalid service of process.

Department of Corrections of Illinois, 434 U.S. 257, 263 n.7 (1978), *reh'g den.*, 434 U.S. 1089 (1978).

C. The Relation Between Rule 54(b) and 28 U.S.C. § 1292(b) is Not at Issue

Petitioner presents a question to this Court concerning the interrelation between Rule 54(b) and 28 U.S.C. § 1292(b), which provides for interlocutory appeal of certain matters. Apparently, the premise of Petitioner's argument on this point is that if the court of appeals perceived that it had jurisdiction of "the appeal" (Petition, p.22) pursuant to § 1292(b) (rather than Rule 54(b)), that would constitute an improper exercise of jurisdiction.

First, there is absolutely no indication in the record that the court of appeals assumed jurisidiction under § 1292(b). (*See* Petitioner's Appendix B.) Moreover, the argument suffers from the same misconception concerning the procedural posture of this case as has been noted above. "The appeal" to which Petitioner appears to refer is the nonexistent appeal of the underlying judgment, and the question of whether it could properly be certified as final pursuant to Rule 54(b).

Had such an appeal been taken, the tension which Petitioner proposes exists between the requirements of Rule 54(b) and those of § 1292(b) might be an issue. However, the denial of 60(b) relief is the only order from which appeal was taken, and there is no argument in the petition which purports to establish some problematic relation between appeals pursuant to denial of Rule 60(b) motions and those pursuant to § 1292(b). Every authority which Petitioner cites as support for the proposition that the court of appeals lacked jurisdiction of "the appeal", if such jurisdiction was exercised based on § 1292(b) (*see* Petition, pp. 18-24), is distinguishable from the instant case on a single ground: in

all of the cited cases, appeals were taken *directly* from either a Rule 54(b) or a § 1292(b) certification. *DeMelo v. Woolsey Marine Industries, Inc.*, 677 F.2d 1030, 1031-2, (5th Cir. 1982) (the court held it had jurisdiction to hear an appeal pursuant to § 1292(b) although certification could have been made pursuant to Rule 54(b); no Rule 60(b) motion appears to have been made); *Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737, 739 (1976) (this Court held that court of appeals lacked jurisdiction of a *direct* appeal from a Rule 54(b) judgment because the judgment was not final; no Rule 60(b) motion appears to have been made); *Bergstrom v. Sears, Roebuck and Co.*, 599 F.2d 62, 65 (8th Cir. 1979) (the court held, on *direct* appeal of Rule 54(b) judgment, that such could serve as the equivalent of a § 1292(b) certification; no Rule 60(b) motion appears to have been made); *Morrison-Knudsen Company, Inc. v Archer*, 655 F.2d 962, 966 (9th Cir. 1981) (on *direct* appeal the court held that a 54(b) judgment is not a substitute for a § 1292(b) certification; no Rule 60(b) motion appears to have been made); *West v. Capitol Federal Savings and Loan Association*, 558 F.2d 977, 982 (10th Cir. 1977) (the court held, on *direct* appeal from a Rule 54(b) judgment, that appellate jurisdiction was absent and was not provided by § 1292(b); no Rule 60(b) motion appears to have been made); *Hunt v. Mobil Oil Corp.*, 410 F.Supp. 10, 27-28 (S.D.N.Y. 1975) (trial court refused to allow § 1292(b) certification of an issue and held that such is not equivalent to Rule 54(b) certification; the court was ruling on a party's motion for § 1292(b) certification, not on a Rule 60(b) motion). In none of those cases was appeal of the primary judgment foregone and Rule 60(b) relief pursued instead, as is true in the case at bar.

The distinction is fundamental and fatal to Petitioner's argument. It serves to highlight the fact that while the

finality of a judgment, whether determined pursuant to Rule 54(b) or § 1292(b), is a proper issue in a direct appeal from such judgment, it is not an issue in an appeal from denial of a Rule 60(b) motion. Absent direct appeal the issue is waived.

II. The Default Judgment Entered by the District Court is a Final Judgment

Even if this Court should conclude it has jurisdiction to review the issues set forth by Petitioner as to the propriety of the Rule 54(b) certification of the judgment as final, such review is not warranted in this case. First, this Court has held that entry of a final judgment pursuant to Rule 54(b), and thus the timing of its release for appeal, "is, with good reason, vested by the rule primarily in the discretion of the District Court as the one most likely to be familiar with the case and with any justifiable reasons for delay." *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 437 (1956). For this reason, the district court's decision to enter a judgment under Rule 54(b) should be afforded substantial deference. *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 10 (1980).

Furthermore, the judgment entered by the district court does have the requisite finality to allow it to stand against the Petitioner. It ultimately disposes of Respondent's claim for relief adjudicating both liability and damages and "leaving nothing to be done but to enforce by execution what ha[s] been determined." *Catlin v. United States*, 324 U.S. 229, 236 (1945).

The 112-year old case of *Frow v. De La Vega*, 82 U.S. (15 Wall.) 552 (1872), relied on by Petitioner, has no applicability to this case, and cannot here stand for the proposition that the judgment against Petitioner is not final. In *Frow*, the complaint against a group of fourteen defendants alleged

they had jointly conspired to defraud the plaintiff. 82 U.S. (15 Wall.) at 554. That is all that was alleged, and that is where Frow parts company with the instant case.

Here, the Respondent's suit against the Petitioner and several other defendants alleges not only conspiracy as a potential ground for relief, but also sets forth conduct amounting to fraudulent omission and misrepresentation by the individual defendants, including Petitioner, which resulted in injury to the Respondent. (Petitioner's Appendix J.) Such conduct can certainly be engaged in by one or more defendants, without any necessity that they agree with one another as to their acts and/or their fraudulent purpose, or that they act in concert.

Moreover, since in a default judgment, all the well-pleaded allegations of the complaint are taken as true, *Thompson v. Wooster*, 114 U.S. 104, 110 (1885); *Trans World Airlines, Inc. v. Hughes*, 449 F.2d 51, 69 (2d Cir. 1971), *rev'd on other grounds*, 409 U.S. 363 (1973), both the allegations as to fraud and as to conspiracy are proved with respect to the Petitioner. Thus, Petitioner's liability to Respondent is established and her liability for fraud in no way depends on the liability of others. In *International Controls Corp. v. Vesco*, 535 F.2d 742 (2d Cir. 1976), *cert. den.*, 434 U.S. 1014 (1978) the court noted that even in the unlikely event that *Frow* is still vital law in light of the adoption of Rule 54(b) allowing for final judgment against less than all parties in a multiple-party suit, it would only "control in situations where the liability of one defendant necessarily depends upon the liability of others." 535 F.2d 742, 746-7 n. 4. The Seventh Circuit has also construed *Frow* so as to limit it to cases where the acts complained of can only result in joint liability. *In re Uranium Antitrust Litigation*, 617 F.2d 1248, 1257 (7th Cir. 1980). Where liability would be joint and several, *Frow* is inapplicable. *Id; see Pang-Tsu-Mow v. Republic of*

China, 225 F.2d 543, 544 (D.C. Cir. 1955). In the instant case, liability *would* be joint and several since the complaint alleges both acts done in concert and acts done independently by various defendants, including the Petitioner. Her argument based on *Frow* incorrectly assumes solely joint liability and for that reason is inappropriate. Hence, while *Frow* may or may not still be good law, there is no need for the Court to decide that question in the context of this case. It is sufficient to conclude that *Frow* simply does not apply here.[4]

CONCLUSION

Throughout this lawsuit, Respondent has been subjected to the dilatory and evasive conduct of Petitioner, whom the district court found to "have engaged in a deliberate course of conduct to obstruct and impede the prosecution of this case." (Petitioner's Appendix D.) The Petition which is now before this Court is yet another link in that chain of behavior.

Respondent has a valid, final and enforceable judgment against the Petitioner, rendered with due regard for all requirements of law and of the Rules of Civil Procedure. While Petitioner now takes issue with the correctness of that judgment, she purposefully waived her right to question it before the courts when she failed to appeal it. The jurisdictional rules of our courts requiring timely appeal are not to be disregarded with impunity; they serve the vital function of "set[ting] a definite point of time when litigation shall be at an end, unless within that time the prescribed application [for review] has been made; and if it has not, to

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[4]Note also that this Court's decision in *Frow* came after the lower court had held the non-defaulting defendants not liable. Thus the decision served to vitiate actually inconsistent adjudications, rather than merely potential ones. 82 U.S. (15 Wall.) 552 (1872).

advise prospective appellees that they are freed of the appellant's demands". *Matton Steamboat Co. v. Murphy*, 319 U.S. 412, 415 (1943)

Petitioner's failure to appeal the underlying judgment against her leaves her without a right to appellate review of that judgment. While this may appear harsh, it is the result of her own calculated choice to ignore the proceedings against her and then to seek relief under Rule 60(b) rather than to challenge the judgment by direct appeal. While Petitioner bemoans her lack of a day in court, she had ample opportunity to defend on the merits and failed to do so. It has already been determined that her failure to defend herself was inexcusable. Thus, Petitioner's efforts to have this Court review her assertions should not be rewarded. Most important, this Court has no jurisdiction to do so. Morever, even if jurisdiction exists, the case does not warrant review, for the reasons set forth above. Thus, the petition for writ of certiorari should be denied.

Respectfully submitted,

WALTER E. HELLER & COMPANY,
Respondent

By: _____
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CERTIFICATE OF SERVICE

I, MARGARET L. VANDERVALK, counsel for Respondent, do hereby certify that I have deposited in the United States Post Office three (3) true and correct copies of the foregoing Brief in Opposition to Petition for Certiorari, certified mail, return receipt requested, addressed to George F. Bloss, III, attorney of record for the Petitioner, at his record mailing address of 1400 24th Avenue, Suite 301, P.O. Box 177, Gulfport, MS, 39502, being the only party required to be served on this, the ____ day of October, 1984.

Margaret L. Vandervalk

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NO. 84-252

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

ANN SHAVERS,

Petitioner,

v.

WALTER E. HELLER & COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

ARGUMENT

Respondent in its Brief in Opposition and in a separate accompanying "Respondent's Motion for Award of Damages -- Frivolity" has leveled charges that petitioner has misrepresented the

posture of this case and that the Petition is frivolous. These are serious charges and strong accusations. In its zeal, respondent has made a grave error. Petitioner is compelled to rebuke respondent in the most blunt and abrupt fashion before this Court, as is appropriate on this occasion.

Specifically, respondent argues throughout its Brief in Opposition that the central issue of this appeal, the finality of the judgment of the district court, was not appealed to the court of appeals and therefore was not properly before that court or this Court. Respondent argues that petitioner's decision to attack the Two and One-half Million Dollar default judgment against her by a motion to vacate under Rule 60(b) of the Federal Rules of Civil Procedure and her election to not file a notice of appeal within 30 days of the entry of the "judgment" in

question, which had been certified as "final" under Rule 54(b), therefore closed the door to appellate review of the finality of the "judgment" forever.

Respondent assumes throughout its Brief in Opposition that appeal of the judgment on its merits is the only mechanism whereby improper Rule 54(b) certification may be challenged. The gravity of this error is enormous. This Court in Sears, Roebuck & Company v. Mackey, 351 U.S. 427, 76 S. Ct. 895, 100 L. Ed. 1297 (1956), stated that a court of appeals could, indeed, review an abuse of a district court's discretion under Rule 54(b), but did not specify how or by what mechanism review was to be done. Left to their respective devices, the courts of appeals have recognized at least four (4) separate and independent means for accomplishing this review in the exercise

of their inherent right to examine finality issues and accordingly, their own appellate jurisdiction which may not be created or waived by agreement of the parties or by improper certification of the court. Bluntly stated, direct appeal of the judgment is but one of those four (4) ways. The other three are: mandamus of the district court, total disregard of the improperly certified "judgment" with impunity until the interlocutory matter does become final by completion of the case on its merits, and finally the express method used in this appeal, motion for relief from the judgment under Rule 60(b) of the Federal Rules of Civil Procedure. Respondent did not advise this Court, in bringing its allegations of frivolity and misrepresentation that three separate courts of appeals have recognized these alternative avenues for challenging

finality of otherwise interlocutory matters. Cinerama, Inc. v. Sweet Music, S.A., 482 F.2d 66 (2d Cir. 1973); Page v. Preisser, 585 F.2d 336 (8th Cir. 1978); Wheeler Machinery v. Mountain States Mineral, etc., 696 F.2d 787 (10th Cir. 1983). Nor did respondent advise this Court that no circuit has expressly held that appeal of the judgment on its merits is the only review mechanism for challenging finality of a matter certified under Rule 54(b). In fact, it does not appear that this Court has previously denied certiorari in any of the cases in which these alternative appellate vehicles were utilized, a point which is of significance only in the sense that the question appears to be one of first impression for this Court and one quite appropriate as a basis for granting certiorari either as an

included component of petitioner's questions presented for review, or as an independent question. With slight rephrasing, respondent's first question presented for review would be a very desirable issue to resolve by this Court. The question might be put as follows: May an otherwise interlocutory matter certified under Rule 54(b) of the Federal Rules of Civil Procedure be appealed under Rule 60(b) of the Federal Rules of Civil Procedure for the purpose of challenging finality where there has been no appeal of the "judgment" on its merits and more than 30 days has transpired?

Petitioner is appalled at the accusations leveled against her of misrepresentation and frivolity and amazed at respondent's oversight, at the very least, of the decisional law on this issue. Even so, petitioner thanks the respondent for giving this Court the opportunity to

address an issue of first impression for this Court. Further, respondent urges that even if it is wrong with respect to the jurisdictional issue, respondent would have this Court believe that the judgment was final. Respondent does not seriously challenge Frow v. De La Vega, 15 Wall. 552, 82 U.S. 552, 21 L. Ed. 60 (1872), and its progeny, but rather seeks to distinguish this case from the time-honored rule that default judgments in fraud and conspiracy cases should not be entered against a single defendant when the liability and damages with respect to remaining defendants has not been fixed. However, respondent does not explain the obvious incongruous results which would occur, particularly with respect to damages, from a determination after a trial on the merits that other defendants engaging in the same conduct alleged as to the plaintiff are held not

liable, or if damages are not actually proved from the facts to be the same, or subject to trebling to such astronomical proportions. Respondent is not heard at all to dispute those cases, including one from this Court, extending the Frow rule beyond joint liability to include cases where there are closely related defenses. Cuebas y Arrendondo v. Cuebas y Arrendondo, 223 U.S. 376, 32 S. Ct. 277, 56 L. Ed. 476 (1912). Nor does respondent undertake to explain how, under the allegations of the Complaint, the alleged fraud could have resulted in damage to respondent from the conduct of petitioner, Mrs. Shavers, acting alone and not in concert with others.

CONCLUSION

Despite respondent's efforts to keep this Court from examining its own jurisdiction and that of the court of appeals, jurisdiction cannot be waived

or conferred by consent and ought to be considered by the Court sua sponte regardless of the manner in which it arrives before the Court, be it by Rule 60(b) motion, direct appeal, mandamus, or delayed appeal in which a Rule 54(b) certificate is ignored until the case becomes final as to all parties and claims. Courts of appeals decertify improperly certified "judgments" regardless of the manner in which the case gets to the Court. The issue is not how the appeal arises, but rather whether the judgment is final. If the judgment is not, the Court must decertify and dismiss even if the parties are ignorant of the defect and are both urging the Court to consider the appeal on its merits. Spencer, White & Prentis, Inc. v. Pfizer, Inc., 498 F.2d 358 (2d Cir. 1974).

In the instant case, nothing more

than an entry of default against Mrs. Shavers was appropriate. To enter any "judgment" against her prior to a determination of the case on its merits as to the remaining defendants in this fraud and conspiracy case clearly violated Frow and its progeny. Any of the four methods mentioned by the Second, Eighth, and Tenth Circuits, if properly acted upon by the courts of appeals, will result in decertification of an improperly certified interlocutory matter. If all that is sought to be accomplished is decertification, the vehicle chosen is irrelevant. Only where other issues become involved, such as an attempt to review the underlying judgment itself, which has not been done in this case, does the method of appeal matter. Mandamus, it would seem, would serve decertification alone. Direct appeal, if the judgment is not truly "final," would decertify the issue but not reach

the merits. A delayed appeal, ignoring erroneous certification until the case is ultimately resolved on its merits as to all parties and issues, would give the Court authority to pierce the improper certification and consider all issues, including post-judgment motions and the merits. A Rule 60(b) motion would permit review of the district court's discretion in not granting relief from the judgment, and would bring the decertification issue before the Court as well.

Respondent says that the decertification issue should have been presented by a method not chosen by Mrs. Shavers. One is reminded of the eloquence of the great American poet, Robert Frost, regarding the selection of alternatives. He said:

> The Road Not Taken
>
> Two roads diverged in a yellow wood,
> And sorry I could not travel both

> And be one traveler, long I stood
> And looked down one as far as I could
> To where it bent in the undergrowth;
>
> Then took the other, as just as fair,
> And having perhaps the better claim,
> Because it was grassy and wanted wear;
> Though as for that the passing there
> Had worn them really about the same,
>
> And both that morning equally lay
> In leaves no step had trodden black.
> Oh, I kept the first for another day!
> Yet knowing how way leads on to way,
> I doubted if I should ever come back.
>
> I shall be telling this with a sigh
> Somewhere ages and ages hence:
> Two roads diverged in a wood, and I--
> I took the one less traveled by,
> And that has made all the difference.

Robert Frost, "The Road Not Taken," in Louis Untermeyer (ed.), The Road Not Taken, An Introduction to Robert Frost, Holt, Rinehart and Winston, New York, 1971, pp. 270-71.

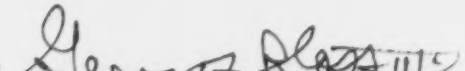
One may speculate as to the result had Mrs. Shavers pursued one of the roads not taken, such as direct review, mandamus, or deliberate delay until final resolution of the litigation. However, she chose a somewhat less traveled route which has indeed made all the difference, because

the issues which gave her immediate concern were properly addressable by Rule 60(b), and particularly the inequities and unjustness raised in her motion to vacate (Appendix G, p. 23-24) which are consistent with Rule 60(b)(6) and her consistent position on appeal that the judgment was improperly certified as final because it is unjust and inequitable to permit a final judgment to be entered against one defaulting defendant in a multiple defendant fraud and conspiracy case where the remaining defendants contest liability and the action remains pending. Rule 60(b)(6) was the express appellate mechanism used to decertify the improperly certified Rule 54(b) motion in Cinerama, Inc. v. Sweet Music, S.A., 482 F.2d 66, 71-72 (2d Cir. 1973). Mrs. Shavers took the better road and either the petition for certiorari should be granted and upon the

merits this Court should direct dismissal of the appeal for the express purpose of decertifying the judgment below as final, or if this Court dismisses the appeal, the dismissal should be predicated upon the court of appeals' lack of jurisdiction to consider a matter which is not final, thereby also decertifying the "judgment."

Respectfully submitted,

ANN SHAVERS, Petitioner

BY: 
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I, GEORGE F. BLOSS, III, counsel for petitioner, do hereby certify that I have deposited in the United States Post Office three (3) true and correct copies of the foregoing Reply Brief of Petitioner, with first class postage prepaid, addressed to MARGARET L. VANDERVALK, Esq., of the firm of Akin, Gump, Strauss, Hauer & Feld, Attorneys of record for respondent, at their record mailing address of 2800 Republic Bank Dallas Building, Dallas, Texas 75201, being the only party required to be served, on this, the 23rd day of OCTOBER, A.D. 1984.

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